Kunasegaran a/l Vadevello v The Pacific Insurance Bhd and other appeals

HIGH COURT (TAIPING) — CIVIL APPEAL NOS AB-12BNCVC-2-03 OF 2021, AB-12BNCVC-3-03 OF 2021, AB-12BNCVC-4-03 OF 2021 AND AB-12BNCVC-5-03 OF 2021
NOOR RUWENA JC
6 FEBRUARY 2024

Insurance — Accident insurance — Duty to disclose — Businessman purchased policies from four insurers to cover against personal accident and death of his 'lorry driver' employee — Insured died about two months after policies were renewed — Death was due to severe head injuries sustained from purportedly falling off a borrowed motorcycle he was riding whilst not wearing a helmet or having a licence to ride the vehicle — Businessman claimed for insured amounts under policies amounting to almost RM1m — Insurers repudiated liability — Sessions court held they were entitled to do so based on exclusion clauses in their policies — Whether businessman's willful failure to disclose to insurers that insured never had a driving licence entitled them to repudiate under para 15 of Schedule 9 of Financial Services Act 2013

The four appeals herein were against the sessions court's dismissal of the appellant's claims against the insurance companies herein for repudiating liability under four personal accident policies he had purchased under the name of one of his 'employees' ('the deceased'). During the validity period of the policies, the deceased, who purportedly worked for the appellant as a lorry driver, allegedly fell off a motorcycle, which he was riding without wearing a helmet and without having a valid driving or riding licence, and sustained severe head injuries from which he died. The appellant claimed payment of a total insured sum of RM990,000 under the four policies, but the insurers relied upon exclusion clauses under their policies to repudiate liability. They contended that the deceased's riding of the motorcycle without a helmet and valid licence clearly breached the terms and conditions of the policies entitling them to refuse payment. The insurers also contended that at the time the appellant purchased the policies, he never declared the fact that he had purchased the same type of insurance cover for the deceased over the same period from other insurers. At the trial, the appellant contended that he never knew that the deceased never had a valid driving licence. He said he did not disclose that fact to the insurers because the insurers' agents had filled up the proposal forms and they never asked him about that fact. The trial judge held that the insurers were entitled to repudiate liability as: (a) the appellant had no locus to claim the insured sums as he was not the deceased's personal representative or next of kin or a named nominee under the policies; (b) the

A appellant had breached the principle of utmost good faith by failing to disclose all material facts concerning the deceased to the insurers at the time he purchased the policies; and (c) the insured had breached the terms and conditions under the policies by riding the motorcycle without wearing a helmet and while not having a valid driving/riding licence.

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Held, affirming the trial court's decision and dismissing the appeals:

(1) The facts of the case showed that the appellant's claims were untenable and the insurers were entitled to repudiate liability under the policies in accordance with para 15 of Schedule 9 of the Financial Services Act 2013 which entitled the insurer to avoid the contract and refuse all claims if the representation made was deliberate or reckless (see paras 58 & 76).

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(2) When he purchased the policies, the appellant failed to make a true representation of the deceased's status of not having a valid licence. The appellant's claims were founded on his illegal act of making a dishonest representation to the insurers. The evidence showed that although the appellant claimed that the deceased was his lorry driver, he drove the deceased to work in the oil palm plantation three times a week because he was fully aware the deceased did not possess a valid driving licence. The willful failure to disclose this fact to the insurers smacked of dishonest misrepresentation. This was the most material of all the facts in this case. Solely on the ground that the deceased had ridden the motorcycle without a licence, the insurers were entitled to rely on the exclusion clauses in their respective policies to repudiate liability (see paras 53–54, 59, 61 & 75).

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[Bahasa Malaysia summary

Empat rayuan di sini adalah terhadap penolakan oleh mahkamah sesyen terhadap tuntutan perayu terhadap syarikat insurans di sini kerana menolak liabiliti di bawah empat polisi kemalangan peribadi yang dibelinya di bawah nama salah seorang 'pekerjanya' ('si mati'). Semasa tempoh sah polisi, si mati, yang dikatakan bekerja dengan perayu sebagai pemandu lori, didakwa terjatuh dari motosikal, yang ditunggangnya tanpa memakai topi keledar dan tanpa mempunyai lesen memandu atau menunggang yang sah, dan mengalami kecederaan parah di kepala yang menyebabkan dia meninggal dunia. Perayu menuntut pembayaran jumlah diinsuranskan sebanyak RM990,000 di bawah empat polisi, tetapi pemberi insurans bergantung pada klausa pengecualian di bawah polisi mereka untuk menolak liabiliti. Mereka berhujah bahawa si mati menunggang motosikal tanpa topi keledar dan lesen yang sah jelas melanggar terma dan syarat polisi yang melayakkan mereka menolak pembayaran. Pemberi insurans juga berpendapat bahawa pada masa perayu membeli polisi, dia tidak pernah mengisytiharkan fakta bahawa dia telah membeli jenis perlindungan insurans yang sama untuk si mati dalam tempoh yang sama daripada pemberi insurans lain. Semasa perbicaraan, perayu berhujah bahawa

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dia tidak pernah tahu bahawa si mati tidak pernah memiliki lesen memandu yang sah. Beliau berkata beliau tidak mendedahkan fakta itu kepada syarikat insurans kerana ejen pemberi insurans telah mengisi borang dan mereka tidak pernah bertanya kepadanya tentang fakta itu. Hakim perbicaraan memutuskan bahawa pemberi insurans berhak untuk menolak liabiliti kerana: (a) perayu tidak mempunyai locus untuk menuntut jumlah yang diinsuranskan kerana dia bukan wakil peribadi atau waris si mati atau penama yang dinamakan di bawah polisi; (b) perayu telah melanggar prinsip niat baik sepenuhnya dengan gagal mendedahkan semua fakta material mengenai si mati kepada pemberi insurans pada masa dia membeli polisi; dan (c) pengambil insurans telah melanggar terma dan syarat di bawah polisi dengan menunggang motosikal tanpa memakai topi keledar dan dengan tidak mempunyai lesen memandu/menunggang yang sah.

Diputuskan, mengesahkan keputusan mahkamah perbicaraan dan menolak rayuan:

(1) Fakta kes menunjukkan bahawa tuntutan perayu tidak boleh dipertahankan dan pemberi insurans berhak untuk menolak liabiliti di bawah polisi mengikut perenggan 15 Jadual 9 Akta Perkhidmatan Kewangan 2013 yang memberi hak kepada pemberi insurans untuk mengelakkan kontrak dan menolak semua tuntutan jika representasi yang dibuat adalah berlebihan atau melulu (lihat perenggan 58 & 76).

(2) Apabila dia membeli polisi-polisi itu, perayu gagal membuat representasi sebenar tentang status si mati yang tidak mempunyai lesen yang sah. Tuntutan perayu diasaskan atas tindakannya yang menyalahi undang-undang membuat representasi tidak jujur kepada syarikat insurans. Bukti menunjukkan walaupun perayu mendakwa si mati adalah pemandu lorinya, dia memandu si mati bekerja di ladang kelapa sawit tiga kali seminggu kerana menyedari sepenuhnya si mati tidak memiliki lesen memandu yang sah. Kegagalan yang disengajakan untuk mendedahkan fakta ini kepada pemberi insurans adalah disebabkan oleh salah nyata yang tidak jujur. Ini adalah yang paling penting daripada semua fakta dalam kes ini. Dengan hanya atas alasan bahawa si mati telah menunggang motosikal tanpa lesen, pemberi insurans berhak bergantung pada klausa pengecualian dalam polisi masing-masing untuk menolak liabiliti (lihat perenggan 53–54, 59, 61 & 75).]

Cases referred to

Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman [2022] 4 MLJ 892; [2022] 9 CLJ 307, CA (refd)

Allianz General Insurance Malaysia v KL Chan & Assoc [2017] 6 MLJ 351; [2017] 8 CLJ 517, CA (refd)

AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals [2022] 5 MLJ 825; [2022] 8 CLJ 175, FC (distd)

Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd [2019] MLJU 217, CA (distd)
Chong Lai Keng (sue as nominee to life assured in Prudential Policy No 35192844 and 35201115, Than Poo Ling (deceased)) v Prudential Assurance Malaysia Bhd [2023] MLJU 2430; [2024] 1 CLJ 293, HC (refd)
Etiqa General Takaful Bhd v Personal Representative of Fatimah bt Adam, deceased & Ors [2022] 11 MLJ 494; [2022] 6 CLJ 385, HC (refd)
Lee Boon Siong v Great Eastern Life Assurance (Malaysia) Berhad [2020] MLJU 1376, HC (refd)
Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors [2006] 1 MLJ 710; [2006] 1 CLJ 1, CA (refd)
Liberty Insurance Bhd v Marrison ak Sidai & Anor [2019] 12 MLJ 763; [2019] 8 CLJ 380, HC (refd)
Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518; [2014] 5 CLJ 851, CA (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)
Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor [2011] 8 MLJ 556, HC (refd)
Tan Siew Wei v Great Eastern Life Assurance (Malaysia) Bhd [2021] MLJU 1909; [2021] 1 LNS 770, HC (refd)
Tay Lye Seng & Anor v Nazori bin Teh & Anor [1998] 3 MLJ 873; [1998] 3 CLJ 466, CA (refd)
Ulaganathan a/l Muthiah v Prudential Assurance Malaysia Berhad [2020] MLJU 210; [2020] 9 CLJ 435, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Financial Services Act 2013 s 129, 129(1), (2), Schedule 9, paras 5, 5(1), (3), (5), (6), (7), 6, 7(1)(b), (2), (4), (8), (15)
Road Transport Act 1987 ss 15(1), 26, 26(1), 90(1), 96(3)
Rules of Court 2012 O 1A, O 55 r 4

Shuroma Guha Thakurta (Manjit & Co) in Civil Appeal Nos AB-12BNCVC-2–03 of 2021, AB-12BNCVC-3–03 of 2021, AB-12BNCVC-4–03 of 2021 and AB-12BNCVC-5–03 of 2021 for the appellant.
Ananth Shanmugam (Azim, Tunku Farik & Wong) in Civil Appeal No AB-12BNCVC-2–03 of 2021 for the respondent.
Vinoshini Saminathan (Isharidah, Ho, Chong & Menon) in Civil Appeal No AB-12BNCVC-3–03 of 2021 for the respondent.
Razlan Hadri Zulkifli (with Aina Shobri) (Gan Ho & Razlan Hadri) in Civil Appeal No AB-12BNCVC-4–03 of 2021 for the respondent.

S Suresh (Kanaga, Suresh & Co) in Civil Appeal No AB-12BNCVC-5–03 of 2021 for the respondent.

Noor Ruwena JC:

INTRODUCTION

[1] Originally there were four appeals which were heard together by this court. On 22 September 2023 this court affirmed the decision of the Sessions Court in Taiping delivered on 26 February 2021 that had dismissed the appellant's claim against the respondents with costs. Dissatisfied with this court's decision, the appellant then filed two notices of appeals on 13 October 2023 in respect of Appeal Nos AB-12BNCVC-2–03 of 2021 and AB-12BNCVC-3–03 of 2021 against The Pacific Insurance Bhd and Berjaya Sompo Insurance Bhd, respectively. It has now come to my attention that the plaintiff has been granted leave by the Court of Appeal on 10 January 2024 to file notices of appeal in respect of the other two cases against the other two insurers, namely AB-12BNCVC-4–03 of 2021 and AB-12BNCVC-5–03 of 2021 against Sykt Takaful Am (M) Bhd and Allianz General Insurance Co (M) Bhd, respectively.

[2] For convenience, I have prepared this grounds of judgment to encompass appeals Nos 2 and 3 then as they involved the same plaintiff (Kunasegaran a/l Vadevello) but different insurance companies, in respect of the same subject-matter, which was one Raja a/l Krishnan (deceased) who was the plaintiff's employee. I will refer to the parties as the 'plaintiff' and 'defendant 1' (Pacific Insurance Bhd) and 'defendant 2' (Berjaya Sompo Insurance Bhd) since the trials were heard together by the sessions court. The plaintiff took four separate actions against the four defendants abovementioned. I will refer to Sykt Takaful Am (M) Bhd and Allianz General Insurance Co (M) Bhd as 'defendant 3' and 'defendant 4', respectively. The court has now updated the first page of the grounds of judgment dated 24 January 2024 only in respect of the status of the four appeals now that leave to appeal has been granted for Appeals Nos 4 and 5 and also the date of this grounds of judgment and renumbering of para 23. Other than that, the contents of the grounds of judgment dated 24 January 2024 and this one are the same.

[3] The crux of the plaintiff's claim was the failure of the four insurers to pay him the agreed policy amounts due to the death of the deceased.

THE APPEAL

[4] Before delving into the issues at hand, it is noted that these suits were registered under commercial disputes by the plaintiff and not as road accident

claim. The evidence adduced in respect of the accident which occurred on 14 December 2018 were the precursor to the claim for compensation totalling *RM990,000* which the plaintiff claimed he was entitled, pursuant to the death of his employee. The defendants refused to make payment under the respective policies, namely on two grounds ie that the deceased was riding a motorcycle without a valid licence at the time of the accident, and failure of the plaintiff to declare that he had obtained policies with other insurers during the same period.

[5] The plaintiff had taken out *three group personal accident policies* under the *deceased's name* with Pacific Insurance, Berjaya Sompo and Allianz General. Then he took out *one group personal accident policy* ie Sykt Takaful Insurance in respect of his *four employees, including the deceased.* Copies of the identity cards of the three other employees were as per exh P19(A-C) and their names were as follows:

(a) Babelan a/l Kunasegaran;

(b) Mathialegen a/l Nyanasgar; and

(c) Nyanasgar a/l Vadevello.

[6] Based on the names and address in the three identity cards above, it appeared that they were all related to the plaintiff, unlike the deceased. It was the plaintiff's contention that Raja a/l Krishnan (the deceased) was offered employment via letter dated 9 May 2017 with a salary of RM4,500 as a general worker (p 410 of the Record of Appeal, Part C).

[7] Details of the renewed insurance policies taken out by the plaintiff were as follows:

No.	Policy No And Name	Issuer and premium paid	Date of Renewal	Validity Period	Amount Insured (RM)
1.	CPN-PO174058-A4 (Pacific Super Protector) pp 426–479 RRBC	Pacific Insurance (RM786.98)	22 October 2018	11 October 2018–10 October 2019	300,000
2.	18DTP/ PQCE000042 (Ultima V3-Plan 5) pp 480–512 RRBC	Berjaya Sompo (RM790.16)	5 October 2018	12 October 2018–11 October 2019	300,000

3.	PGP-P0052438–30-AGT-17 (Polisi Kemalangan Diri Takaful Berkelompok) pp 561–599 RRBC	Sykt Takaful Am (RM1,865)	18 December 2017	29 December 2017–28 December 2018	150,000
4.	No 17 PTP0000254-01 (Allianz Shield Plan 04) pp 513–560 RRBC	Allianz General (RM540)	15 October 2018	11 October 2018 10 October 2019	240,000
				Total	990,000

[8] A total of seven witnesses testified for the plaintiff and six witnesses testified for the defendants. The plaintiff's witnesses were the Investigation Officer (SP1) and two other police personnel (SP3 and SP4), the medical officer and personnel (SP2 and SP5) as well as the owner of the motorcycle (SP6) and the plaintiff (SP7). Meanwhile the witnesses who had testified for the defendants were SD1 and SD2 (defendant 1), SD3 (defendant 2), SD4 and SD5 (defendant 4) and SD6 (defendant 3).

[9] Prior to the hearing of the appeal on 8 August 2023, the court heard an application made by the plaintiff in encl 18 (defendant 1) and encl 14 (defendant 2), encl 14 (defendant 3) and encl 20 (defendant 4) in the respective appeal numbers for extension of time to file the Draft Index of the records of appeal in accordance with O 55 r 4 of the Rules of Court 2012 ('the ROC') after the defendants raised preliminary objections on the plaintiff's failure to serve the same in accordance with the rules. The plaintiff's explanation for the delay was because of the extensive written grounds of judgment of the sessions court judge ('SCJ') and the Draft Index were inadvertently left out from the records of appeal and there was no prejudice to the defendants. The defendants argued that the prejudice they suffered was they were unable to comment on the inclusion or exclusion of documents in the records of appeal.

[10] However, the court noted that the defendants did not deny when the plaintiff stated they only included relevant documents from the lower court. The court had considered the period of delay, the reason, chances of appeal succeeding if time was allowed and the prejudice caused to the opponent, and whether this could be compensated by costs. The court also considered and applied O 1A of the ROC. The application was allowed and ordered the plaintiff to pay costs to the defendants.

A FACTS OF THE CASE

[11] The plaintiff was a businessman who owned two registered businesses, namely as sole proprietor of Kunasegaran a/l Vadivelloo ('the business') and a partner for 11 years in Pesona Sdn Bhd with his wife Law Hooi Poh ('the company'). The business of the plaintiff was to supply construction materials, retail goods, trader of oil palm fruits, fruits, furniture, poultry, agricultural products and metal scraps. *He employed the deceased as a lorry driver* to transport oil palm fruits from the surrounding areas of Selama and Pondok Tanjung in May 2017 with a monthly salary of RM4,500 (refer to pp 410–414 of the RR Part C). It appeared from the salary slips exhibited that the employer and employee was not contributing to EPF and SOCSO. The plaintiff testified that he took out the insurance cover for the deceased as an incentive for his worker.

[12] In 2017, the plaintiff purchased the policies of insurance (as set out above). About 1.5–2 months after the policies were renewed in 2018, the deceased met with an accident on 14 December 2018 at approximately 1.03pm at KM27 Jalan Taiping–Selama after a motorcycle bearing registration No AFU 1730 on which he was riding alone was believed to have skidded and crashed. There were no eye-witnesses to the accident and the circumstantial evidence pointed to the fact that the deceased lost control of the motorcycle, was flung off and fell on the road. As he was not wearing a helmet at that time, the deceased sustained severe injuries to his head. He was warded at the Hospital Taiping wherein he passed away on 15 December 2018 at 6.38pm due to 'Severe traumatic brain injury' (refer to exhs P3, P4, P9 and P10). According to SP2, the injury was due to a hard fall from motor vehicle accident.

[13] Although during the trial, counsel for defendant three disputed the cause of the accident, nevertheless, the Investigation Officer (SP1) was firm in his findings that the accident occurred due to the deceased's own carelessness. This was due to the fact that from a JPJ search in 2019 (p 415 of RR Part C) showed that the deceased did not possess a valid driving licence but had only obtained a Class B learner driver's licence (L-licence) on 3 August 2001 which expired on 25 May 2003 and was never renewed thereafter, despite the plaintiff claiming that the deceased was employed as a lorry driver.

[14] The main issue of the disputes was the defendants' refusal to make out the compensation payments for the death of the deceased under the four policies although the plaintiff had paid the required premiums (refer to the schedule above) and death occurred during the validity period of all the policies. The defendants contended that they could not honour the respective agreement because the deceased was riding the motorcycle without a valid licence at the material time, which came within Exclusion No 12 under the terms of the policy for defendant 1, Exclusion No 2 for defendant 2, Exception

2(b) for defendant 3 and Exclusion No 13 for defendant 4. Moreover, the plaintiff failed to declare in the proposal forms during the renewal that he had obtained policies from other insurers, namely defendant 2 and defendant 3.

ISSUES IN THE APPEAL

[15] The grounds of complaint against the decision of the SCJ in the memorandum of appeal (refer to encl 5 and/or 45 pp 14–34) and additional memorandum of appeal (refer to encl 13 and/or 52, pp 643) were extensive and many of them repetitive. The memorandum of appeal contained 60 grounds and the additional memorandum of appeal contained 85 grounds. The defendants raised objections that the plaintiff had filed an additional memorandum of appeal without leave of the court whereas it should have been filed as amended memorandum of appeal. It was not an amended memorandum of appeal but the contents were additional grounds after the grounds of judgment of the SCJ was obtained. The court did not make a ruling on this and proceeded to hear the appeal. The records of appeal were re-filed after the application for extension of time to file the Draft Index was granted. The issues in the appeal as summarised were as follows:

(a) whether the insurance policy fell within the ambit of a consumer insurance contract or non-consumer insurance contract;

(b) if the court finds that it is a consumer insurance contract, whether there has been compliance by the parties with the whole prosess or procedure under para 5, Part II, Schedule 9 of the Financial Services Act 2013 (Act 758);

(c) whether the plaintiff received any notice in writing in respect of the pre-contractual duty to disclose prior to entering into the contract of insurance;

(d) can the defendants be allowed to rely on a new ground which was never raised in the repudiation letter rejecting the plaintiff's claim;

(e) has it been proved on a balance of probabilities that the deceased died by accidental means;

(f) does the basis clause apply if the court finds that the contract of insurance is a consumer insurance contract;

(g) can the defendants repudiate liability by relying on the exclusion clauses; and

(h) should s 114(g) Evidence Act 1950 be invoked against the defendants for failing to call as a witness their authorised agent(s) who filled up the proposal form on behalf of the plaintiff who could not speak and understand the English Language.

[16] It is trite that an appellate court would be slow to disturb the decision of the trial court unless the court was convinced that there have been substantial misdirection of facts and law in the trial court which merited appellate intervention. Therefore, the appellant must convince the appellate court that the decision appealed from was wrong. The rationale for this is that the trier of fact would have had the benefit and advantage of seeing and hearing the witnesses and the opportunity to assess their demeanour: *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214. The trial judge would have had first-hand opportunity to evaluate and appraise the evidence of the witnesses who testify before him.

[17] The appellate court then examines the trial court's process of evaluation of the evidence adduced and application of the relevant laws in arriving at its decision and compares them against the grounds raised in the memorandum of appeal. At the end of the day, similar to the trial court, the duty of the appellate court in a civil appeal is to determine whether the appellant has proved his case on a balance of probabilities. The legal burden of proof lay on the plaintiff to prove his case that the defendants have repudiated the respective contract of insurance without any legal basis.

[18] The court noted that the SCJ prepared four grounds of judgments but the contents were almost similar. In coming up with the decision on the appeals, the court has used the grounds of judgment for Berjaya Sompo (defendant 2) as reference for all the appeals since the SCJ has ruled the trials to be heard together but the issues for the four claims be dealt with separately. As stated earlier, the plaintiff filed two notices of appeals to the Court of Appeal against defendant 1 which had taken the view that the contract was a consumer insurance contract and defendant 2 that purportedly argued it was a non-consumer insurance contract.

[19] The plaintiff's evidence can be summarised as follows:

(a) that the defendants' agents by the name of Fong Kok Wai (defendants 1 and 3), Yew Kai Chong (defendant 2), and Abdul Saidi Bin Badri (defendant 2) attended to him the first time when the plaintiff wanted to purchase insurance for his employees;

(b) that the insurance agents had filled up the proposal forms whereby they would ask him questions and he supplied the answers;

(c) that he had fulfilled his obligations to disclose when the proposal forms were being prepared by the said insurance agents;

(d) that they had never asked him whether the proposed insured had a valid driving licence and road tax;

(e) that had they asked him those questions, he would have gone to see the employee to get his confirmation and then he would reverted to the respective agents with the answer(s);

(f) that they also never asked him those questions upon renewal of all the policies;

(g) all the said agents filled up the forms for him when he attempted to make the claims after the death of the deceased;

(h) that all the policies had never been cancelled despite them rejecting his applications;

(i) that the defendants had never stated the reason why his applications were rejected; and

(j) that the agents of the defendants had never asked him to make a disclosure as required under s 129 of the Financial Services Act 2013.

[20] In summary, para 19 of the grounds of judgment contained the SCJ's finding that the plaintiff did not come to court with clean hands because he did not disclose in the proposal forms that he did not know about or was ignorant of the important notice. He blamed the insurance agents who had filled out the proposal forms for him, namely Fong Kok Wai, Yew Kai Chong and Abdul Saidi bin Bakri. However, the facts showed that it was the plaintiff who signed the proposal forms and therefore the SCJ held that the plaintiff owed the duty to disclose as required under the law. It was noted that this was not pleaded in the statement of claim but instead in his reply to defence the plaintiff brought up the issue that he was not asked about those questions in the proposal forms. The defendants pleaded that the duty to disclose existed separately from any duty to fill out the forms.

[21] In para 20, the SCJ found that despite claiming that he was not familiar with the terms of the contract (ignorance), the SCJ found that he was a smart businessman who was maths-savvy (*celik matematik*) as he was the one who would gather the facts and figures for the proposal forms. He paid for all the premiums which the payout would add up to almost RMm. The deceased died about two months after the policies were renewed but no one saw how the accident happened. SP1 concluded from his investigations that the deceased was not wearing a helmet and did not have a valid driving licence, road tax (expired in February 2011) and the motorcycle was not insurance-covered (refer to the summary of SPI's evidence in p 21). SP1 concluded that the deceased was incapable of handling the motorcycle and it was his own negligence that caused the accident. The deceased obtained an L-licence in the beginning but that was all. SP6, the owner of the motorcycle refused to cooperate with the police during the investigation stage. In para 37, the SCJ found that clearly the deceased had breached the law. It was without doubt too

A that SP6 at the material time had breached the law when he allowed the deceased to use that motorcycle regardless of the fact that he stated in evidence the said motorcycle was not meant to be used on the road.

B **[22]** Needless to say, as the trier of fact, the SCJ had the benefit of directly observing and assessing the demeanour of each witness who testified before her. This court noted that the SCJ in the grounds of judgment had noted her observations in respect of the plaintiff's evidence at the trial. For ease of reference, I refer to the following paragraphs which are pertinent to her conclusion that the plaintiff 'was not as illiterate or ignorant such as he claimed to be':

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> [61] Semasa perbicaraan, plaintif juga menyatakan bahawa beliau juga menjalankan perniagaan memungut dan membeli 'besi buruk' yang hanya dibantu oleh Raja a/l Krishnan iaitu melakukan kutipan besi buruk di sekitar Daerah Larut Matang dan Selama dan Daerah Kerian, Perak. *Mahkamah berpendapat walaupun plaintif tidak berpelajaran tinggi tetapi beliau tidak terhalang untuk berniaga dan menguasai pelbagai bahasa termasuklah bahasa Cina atau Inggeris untuk berkomunikasi dengan isteri, pemilik ladang berbangsa Cina, ejen insurans dan rakan perniagaan di sekitar Daerah Larut Matang dan Selama dan Daerah Kerian.*
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> [63] Berdasarkan soalan dan jawapan dalam PSP7, dirumuskan bahawa SP7 sebagai majikan memainkan peranan yang penting dalam memperoleh fakta dan angka untuk untuk menginsuranskan Raja a/l Krishnan di bawah polisi dengan empat syarikat penanggung insurans, iaitu Pacific Insurance, Berjaya Sompo Insurance, Allianz General Insurance dan Takaful Malaysia. Naratif kes plaintif dalam Penyata Saksi (yang ditandakan sebagai PSP7, encl 74 dalam Saman AB-A52NCC-7–05 Tahun 2019, mengandungi 164 soalan dan jawapan yang dibuat oleh plaintif sendiri serta jawapan diaku benar oleh plaintif) telah mengemukakan dokumen dalam Ikatan C dan D encl 44 dan 45 dalam Saman AB-A52NCC-7–05 Tahun 2019 bagi menyokong tuntutan terhadap empat syarikat penanggung insurans, iaitu Pacific Insurance, Berjaya Sompo Insurance, Allianz General Insurance dan Takaful Malaysia.
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> [64] SP7 telah menggunakan khidmat jurubahasa semasa memberi keterangan kerana mendakwa dia tidak fasih berbahasa Malaysia atau Inggeris. Mahkamah meragui perkara ini kerana SP7 telah menulis surat Tawaran Pekerjaan (eksh P20) dengan penggunaan bahasa dan penyusunan ayat yang baik dan jawapan kepada 164 soalan dalam penyata saksi dibuat dalam Bahasa Malaysia itu diaku benar dibuat olehnya sendiri?
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> ...
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> [70] Plaintif yang mengisytiharkan dalam borang cadangan untuk polisi 'Pacific Super Protector' bahawa maklumat peribadinya dalam borang cadangan bertarikh 11 Oktober 2017 adalah benar (merujuk di muka surat 33 Ikatan D dalam encl, 45) dan plaintif bersetuju bahawa cadangan itu dijadikan dasar kontrak di antara pihak-pihak ('klausa asas'). Merujuk kepada soalan 1(d), hanya mengisytiharkan

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polisi yang dipohon kepada Allianz General Insurance.

[71] Pacific Insurance ('defendan') menginsuranskan Raja a/l Krishnan ('si mati') dalam jumlah RM300,000 terhadap kematian akibat kemalangan. Plaintif telah memperbaharu polisi asal CPNPOI 74058-A4 yang luput pada 11 Oktober 2018, maka tempoh sah laku dilanjutkan bagi tempoh dari 11 Oktober 2018 hingga 10 Oktober 2019. Bagaimanapun, tiada borang cadangan baru ditanda tangan oleh plaintif. Plaintif, semasa membaharukan polisi, tidak mengisytiharkan polisi diisu oleh Takaful Malaysia yang sah laku hingga 29 Disember 2018 atau polisi Berjaya Sompo Insurance yang bertarikh 5 Oktober 2018 semasa melanjutkan tempoh sah laku polisi CPN-POI 74058-A4.

[72] Apabila polisi insurans bernombor CPN-POI 74058–A4 yang luput pada 11 Oktober 2018 diperbaharu untuk tempoh tetap dengan persetujuan bersama, borang cadangan asal polisi insurans bernombor CPN-POI 74058-A4 itu digabungkan dengan polisi bertarikh 22 Oktober 2018 yang diperbaharui itu dan berterusan membentuk asas kontrak. Begitu juga dalam kes ini, terma mengenai pembaharuan dengan jelas menyatakan bahawa pembaharuan tarikh kuat kuasa tersebut adalah 'tertakluk kepada semua terma, syarat dan pengindorsan dalam polisi asal' (di muka surat 43 Ikatan D), ia termasuklah deklarasi dalam borang cadangan asal yang membentuk asas kontrak itu. Itu juga membentuk sebahagian daripada polisi yang diperbaharui (rujuk di muka surat 51 Ikatan D).

...

[74] Plaintif yang mengisytiharkan dalam borang cadangan untuk polisi 'Group Allianz Shield' bahawa maklumat peribadinya dalam borang cadangan bertarikh 11 Oktober 2017 adalah benar [merujuk di muka surat 120 Ikatan D dalam encl 45] dan plaintif bersetuju bahawa cadangan itu dijadikan dasar kontrak di antara pihak-pihak ('klausa asas'). Merujuk kepada soalan 1(d), hanya mengisytiharkan polisi Pacific Super Protector CPN-POI 74058-A4 (merujuk di muka surat 119 Ikatan D dalam encl 45) sedangkan polisi Takaful Group Personal Accident' (merujuk eksh D43) masih sah laku sehingga 29 Disember 2018.

[75] Allianz General Insurance ('defendan') menginsuranskan Raja a/l Krishnan ('si mati') dalam jumlah RM240,000 terhadap kematian akibat kemalangan. Plaintif telah memperbaharu polisi asal 'Allianz Shield Plan 04' bernombor 17PTP0000254-01 yang luput pada 11 Oktober 2018, maka tempoh sah laku dilanjutkan bagi tempoh dari 11 Oktober 2018 hingga 10 Oktober 2019. Bagaimanapun, tiada borang cadangan baru ditandatangan oleh plaintif. Plaintif tidak mengisytiharkan polisi diisu oleh Takaful Malaysia yang sah laku hingga 29 Disember 2018 atau polisi Berjaya Sompo Insurance yang bertarikh 05/10/2018 semasa melanjutkan tempoh sah laku polisi 'Allianz Shield Plan 04' bernombor 17PTP0000254–01.

...

[77] Berjaya Sompo Insurance ('defendan') menginsuranskan Raja a/l Krishnan ('si mati') dalam jumlah RM300,000 terhadap kematian akibat kemalangan, bagi tempoh dari 12 Oktober 2018 hingga 11 Oktober 2019. Bagaimanapun, plaintif tidak mengisytiharkan polisi diisu oleh Takaful Malaysia yang sah Iaku hingga 29 Disember 2018 atau polisi Allianz General Insurance dan Pacific Insurance yang sah

hingga 10 Oktober 2019 semasa ejen Yew Kai Chong mengisikan borang cadangan Yang Ditanda tangan oleh plaintif bagi polisi kemalangan Diri Ultima V3.

[78] Peguam defendan bagi kes AB-A52NCC-12–08 Tahun 2019 memohon supaya plaintif disoal balas mengenai status kewangan dengan merujuk kepada dokumen Cukai Pendapatan (Borang B) bagi tahun Taksiran 2017 dan 2018 perniagaan Kunasegaran a/l Vadevello. Maka pemeriksaan balas ditangguh kepada 24 September 2020 bagi membolehkan plaintif membawa dokumen e/B 2017 — 2018 bagi pemeriksaan balas oleh peguam defendan-defendan.

[79] Pada 24 September 2020, pemeriksaan balas disambung dengar dengan penandaan e/Be Tahun 2017 (eksh P51) dan e/B Tahun 2018 (eksh P52). Semasa diperiksa balas oleh peguam Defendan yang mewakili Berjaya Sompo Insurance, SP7 juga dicabar atas kegagalan SP7 untuk mendedahkan fakta berkenaan perlindungan takaful khususnya merujuk pekerja bernama Raja a/l Krishnan semasa SP7 mengisi borang cadangan memperbaharu polisi insurans yang diisu oleh Pacific Insurance dan Allianz General Insurance. SP7 didapati gagal mendedahkan fakta bahawa SP telah memperoleh polisi insurans yang diisu oleh Pacific Insurance dan Allianz General Insurance semasa dia meminta ejen Yevv Kai Chong mengisikan borang cadangan untuk memperoleh Polisi Kemalangan Diri Ultima V3 (eksh P32) dari Berjaya Sompo Insurance.

[80] Semasa pemeriksaan balas oleh peguam defendan yang mewakili Alianz General Insurance, SP7 hanya merujuk eksh PI 9 (A)–(C) mengenai pekerja bernama Kabelan a/l Kunasegaran (encl 45, Ikatan D di muka surat 25) yang diakui ialah anak SP7 yang mula bekerja sejak 5 tahun lalu dan dibayar RM3,000 sebulan. Mathialegen a/l Nyanasegar (encl 45, Ikatan D di muka surat 26) pula ialah anak saudara SP7 yang mula bekerja sejak empat tahun lalu dan dibayar RM2,800 sebulan. Nyanasegar a/l Vadivelloo (encl 45, Ikatan D di muka surat 27) ialah adik SP7 yang mula bekerja sejak tujuh tahun lalu dan dibayar RM4,500 sebulan.

[81] Terdapat seorang lagi pekerja bernama 'Devanthiran' yang tidak disebut di bawah Sijil Kemalangan Diri Takaful Berkelompok bertarikh 4 Januari 2017. SP7 dirujuk kepada senarai pekerja yang dinamakan di bawah Sijil Kemalangan Diri Takaful Berkelompok bertarikh 4 Januari 2017 yang sah Iaku bagi tempoh 29 Disember 2016–28 Disember 2017, termasuk Devanthiran yang didakwa menggantikan Raja a/l Krishnan. *Pada tahun 2016, senarai pekerja dalam Sijil Kemalangan Diri Takaful Berkelompok adalah termasuk Raja a/l Krishnan tetapi dokumen Surat Tawaran Kerja bertarikh 10 Mei 2017 (eksh P201 menunjukkan Raja mula kerja sejak 10 Mei 2017 dengan SP7 sebagai pemandu lori dalam kawasan ladang sawit.*

[82] Menurut SP7, *Raja melakukan pelbagai kerja am di ladang bagi memunggah kelapa sawit dan lazimnya kerja mengutip buah kelapa sawit bermula jam 10-10.30 pagi dan dia mengambil masa 2–3 jam untuk memungut buah kelapa sawit bergantung kepada luas kawasan ladang sawit,* dan ladang Ah Ling adalah berkeluasan lebih kurang 18 ekar sahaja. Lazimnya Raja selesai memungut buah sawit di ladang berkeluasan 60 ekar ialah dalam masa 4–5 jam.

[83] Menurut SP7, gaji sebulan dibayar kepada Raja ialah RM4,500. Bukti penyata bayaran gaji (dalam eksh P21 yang disediakan kerani bernama Nadiana) tidak ada

tandatangan Raja kerana Raja buta huruf. Peruntukan mengenai cuti rehat yang diperuntukkan juga tidak dinyatakan atas slip gaji. Gaji Raja dibayar penuh tanpa tolakan bayaran SOCSO. Raja tidak ada masalah kewangan atau membuat apa-apa pinjaman dengan plaintif. Raja dilindungi polisi insurans pekerja yang diperoleh plaintif sebagai majikan sepanjang Raja bekerja untuk perniagaan 'Kunasegaran a/l Vadevello' yang berdaftar sejak 2014 serta milikan tunggal SP7.

[84] SP7 mengenali Govindasamy a/l Sinnian (pemilik motorsikal AFU1730) sejak sepuluh tahun dan mengenali majikan Govindasamy, Ah Ling yang berbangsa Cina. Luas ladang Ah Ling ialah 18 ekar. Raja a/l Krishnan dihantar tiga kali sebulan untuk mengutip buah sawit di ladang Ah Ling. *SP7 yang akan menghantar Raja dengan lori untuk mengangkut buah sawit. Selepas Raja dan lori dihantar ke ladang Ah Ling, SP7 balik ke pejabat dengan meminta bantuan kawan atau pekerja di Ladang Ah Ling untuk menghantarnya pulang ke pejabat di Batu Kurau. Pada 14 Disember 2018, Raja dihantar ke ladang Ah Ling untuk mengutip buah sawit.*

[85] Menurut SP7, Raja yang bekerja sebagai pemungut besi buruk, baru dikenali sejak setahun lalu. Raja a/l Krishnan hanya ada ibu dan seorang abang manakala bapanya telah meninggal dunia. SP7 tidak ada nombor telefon ibu atau abang Raja. Kumaran a/l Muniandy ialah abang sepupu Raja a/l Krishnan. SP7 menafikan dia telah menghubungi Kumaran untuk menyuruhnya membuat laporan polis mengenai nahas yang menimpa Raja. *Ahli keluarga Raja a/l Krishnan bukan 'nominee' si mati bagi polisi yang diperoleh untuk menginsuranskan Raja atas kematian akibat kemalangan dan mereka berkemungkinan tidak ada pengetahuan tentang polisi insurans yang diperoleh plaintif bagi perlindungan dari kecederaan diri atau kematian akibat kemalangan atas nama si mati.*

[86] *Semasa pemeriksaan balas oleh peguam Berjaya Sompo, SP7 mengatakan dia tidak ada pengetahuan bahawa motorsikal AFU1730 tidak dilindungi insurans dan cukai jalan motorsikal telah luput. Malah SP7 tidak ada pengetahuan sama ada si mati mempunyai lesen menunggang atau memandu kenderaan yang sah atau tidak.*

[87] Plaintif (SP7) menafikan dakwaan dalam soal balas oleh peguam defendan-defendan bahawa terdapat perlanggaran prinsip *uberimae fidei* atau niat suci hati dan meletakkan beban ke atas tiga ejen penanggung insurans yang membantunya mengisikan borang cadangan atau dia tidak dijelaskan oleh tiga ejen penanggung insurans iaitu Fong Kok Wai, Yew Kai Chong dan Abdul Saidi bin Bakri tentang keperluan untuk isytiharkan semua polisi yang menginsuranskan Raja a/l Krishnan.

[88] Di peringkat pemeriksaan semula oleh peguamnya, SP7 mengatakan bahawa dia tidak pernah ditanyakan oleh ejen atau diberikan notis mengenai keperluan si mati untuk mempunyai lesen menunggang motorsikal atau memandu kenderaan yang sah jika polisi perlindungan insurans hendak dibeli atas penama Raja a/l Krishnan atau berkenaan batasan aktiviti memandu atau menunggang motorsikal dalam polisi-polisi sedia ada atas nama Raja a/l Krishnan.

[23] I have highlighted the paragraphs above from the grounds of judgment as these were important points to note for the court in deciding whether the defendants were justified in not honouring the claims submitted by the

plaintiff not long after the deceased died. A perusal of her summary of the plaintiff's evidence in paras 76 and 77 showed that the *SCJ found he did not declare that he had obtained coverage from defendant 2 and defendant 4.* He had declared with defendant 3, or rather, the agent Fong Kok Wai made the declaration, only when he applied for renewal of the coverage from defendant 1 (refer to paras 81–82) and he admitted that the deceased's family may not know about the policies.

[24] Then, the SCJ made her finding on the issue of the deceased not in possession of a valid full licence in paras 206–207. This is where s 26 of the RTA comes in, namely, the requirement to have valid licence. The SCJ agreed with the defendants' submissions (refer to paras 212, 213, 215). *In para 220 she found the insurers were not liable for repudiation of the insurance contract.* The burden of proof was on the plaintiff to prove his case that the accident was not caused by other things in order to qualify for the pay out but this he failed to do (refer to paras 226–231. The SCJ concluded in para 232 that the deceased died due to a motor vehicle accident (MVA) but the exclusion clause(s) applied (refer to paras 234–237). The SCJ stated in para 249 that the plaintiff was bound by his pleadings and this issue of consumer contract/life insurance was not pleaded; he was therefore barred from raising it at the submissions stage.

[25] Finally, the SCJ arrived at the following conclusions:

> [252] Setelah meneliti keterangan-keterangan lisan saksi-saksi plaintif dan defendan serta keterangan dari dokumen-dokumen yang dikemukakan dan setelah membaca hujahan bertulis peguam plaintif dan peguam defendan serta hujahan balas yang difailkan dan setelah mendengar hujahan lisan pihak-pihak, keputusan saya dalam kes ini adalah seperti berikut:
>
> (i) berdasarkan isu awalan ini sahaja, mahkamah memutuskan bahawa peruntukan Jadual ke-10 Akta 758 yang dibaca secara harmoni dengan terma Polisi Insurans Kemalangan Diri Peribadi Ultima V3 — Plan 05 (eksh P31 di muka surat 98 Ikatan D) bahawa pembayaran wang polisi apabila berlaku kematian orang yang diinsurankan adalah dibuat kepada wakil peribadi Orang Yang Diinsurankan (Raja a/l Krishnan). Mahkamah memutuskan bahawa oleh sebab Plaintif, tidak mempunyai hubungan kekeluargaan dengan simati, bukan waris kadim dan bukan nominee yang dinamakan dalam Borang Penamaan (eksh P32, rujuk muka surat 86 Ikatan D) adalah *tidak tergolong* sebagai *wakil peribadi* dan diputuskan Plaintif *tidak ada locus dan tidak layak dibayar* atas tuntutan pampasan di bawah polisi insurans Kemalangan Diri Peribadi Ultima Plan 05 (eksh P31 yang bernombor 18DTP/PQCE000042);
>
> (ii) terdapat ketidakdedahan fakta penting oleh Plaintif atau ketaknyataan yang material kepada soalan 6 dalam borang cadangan [rujuk muka surat 86 Ikatan D, encl 45) yang mewajarkan penolakan liabiliti (dipli dalam perenggan 6 Pembelaan dalam encl 5 dan Pembelaan Terpinda dalam encl 21);

(iii) penolakan liabiliti secara dasarnya adalah bergantung kepada Polisi yang diisu oleh Defendan di bawah terma pengecualian 2 (d) dan (e) mengenai ketakpatuhan Orang Yang Diinsuranskan (Raja a/l Krishnan) untuk memenuhi terma-terma, syarat-syarat dan pengendorsan Polisi ini setakat mana ia berhubung kait dengan apa sahaja yang perlu dilakukan atau dipatuhi oleh orang yang diinsuranskan iaitu Raja a/l Krishnan;

(iv) faktor berlakunya kecederaan parah semasa ditimpa malang akibat kecuaian sendiri oleh orang yang diinsuranskan iaitu Raja a/l Krishnan yang tidak memakai topi keledar semasa menunggang motorsikal, dan perlakuan yang menyalahi kepentingan dan polisi awam/undang-undang sedia ada, iaitu menunggang motorsikal yang tidak dilindungi insurans dan tiada cukai jalan; dan

(v) mahkamah, dalam keadaan kes ini, dengan mempertimbangkan maxim 'ex turpi causa non oritur' mahkamah tidak menyetujui kemungkiran undang-undang oleh orang yang diinsuranskan iaitu Raja a/l Krishnan yang ternyata telah melakukan beberapa perbuatan yang menyalahi peraturan dan undang-undang jalan raya sedia ada.

EVALUATION AND FINDINGS OF THE COURT

[26] While I agreed with the decision of the SCJ in not allowing the plaintiff's claim, there were some errors made in her grounds of judgment. These errors, in my view, do not require appellate intervention because having considered the submissions and case laws cited by the parties, I am of the view that the SCJ's decision can be upheld by this court as there was no substantial miscarriage of justice. There must have been insufficient judicial appreciation of the relevant evidence which had occasioned a serious miscarriage of justice: *Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd* [2014] 2 MLJ 518; [2014] 5 CLJ 851. An appellate court has a duty to intervene where a trial court has so fundamentally misdirected itself, that one may say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion: *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395.

[27] From the numerous grounds raised in the memorandum of appeal and additional memorandum of appeal, I agree with the plaintiff to narrow down the issues to be decided by this court as follows:

(i) has it been proved on a balance of probabilities that the deceased died by accidental means;

(ii) whether the insurance policy fell within the ambit of a consumer insurance contract or non-consumer insurance contract;

(iii) does the basis clause apply if the court finds that the contract of insurance is a consumer insurance contract;

(iv) if the court finds that it is a consumer insurance contract, whether there has been compliance by the parties with the whole prosess or procedure under para 5, Part II Schedule 9 of the Financial Services Act 2013 (Act 758) including the duty of disclosure;

(v) whether the plaintiff received any notice in writing in respect of the pre-contractual duty to disclose prior to entering into the contract of insurance;

(vi) can the defendants be allowed to rely on a new ground which was never raised in the repudiation letter rejecting the plaintiff's claim; and

(vii) should s 114(g) Evidence Act 1950 be invoked against the defendants for failure to call their authorised agent(s) who filled up the proposal form on behalf of the plaintiff as a witness.

(i) Has it been proved on a balance of probabilities that the deceased died by accidental means

[28] I do not wish to spend a lot of time on this issue because the evidence from SP2 were very clear that the deceased died of 'Severe traumatic brain injury' due to hard fall during motor vehicle accident. This finding was supported by the investigation of SPI which concluded that the deceased was not wearing any helmet at the material time, based on SP5's evidence who was among the first to arrive at the scene and did not find any helmet nearby the body. The SCJ found that the fatal injuries were due to hard fall sustained during an accident as explained by SPI and SP2 and there was no reason not to accept the investigation officer's evidence. There was also no evidence that the deceased was attacked by known or unknown persons. The plaintiff has proved this issue on a balance of probabilities despite the questions in cross-examination by the defendants' respective counsels.

(ii) Whether the insurance policy fell within the ambit of a consumer insurance contract or non-consumer insurance contract

[29] The SCJ in her grounds of judgment at para 187 (defendant l's suit) stated the issue of 'consumer insurance contract' and 'non-consumer insurance contract' was without merit as it was not pleaded by the plaintiff. Nevertheless, this was a misdirection on the part of the SCJ as the court eventually still has a duty to determine the issue. The regime for insurance in Malaysia is comprehensively provided in s 129(1) of Act 758 which sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3. For ease of reference, the relevant provisions of the law (Schedule 9) are reproduced as follows:

Interpretation

2. In this Schedule — 'consumer' means the individual who enters into, varies or renews a consumer insurance contract, or proposes to do so with a licensed insurer; 'consumer insurance contract' means a contract of insurance entered into, varied or renewed by an individual wholly for purposes unrelated to the individual's trade, business or profession.

...

PART 2

Pre-contractual disclosure and representation

Pre-contractual duty of disclosure for insurance contracts other than consumer insurance contracts

4 (1) Before a contract of insurance other than a consumer insurance contract is entered into, varied or renewed, a proposer shall disclose to the licensed insurer a matter that —

(a) he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied; or

(b) a reasonable person in the circumstances could be expected to know to be relevant.

(2) The duty of disclosure shall not require the disclosure of a matter that —

(a) diminishes the risk to the licensed insurer;

(b) is of common knowledge;

(c) the licensed insurer knows or in the ordinary course of his business ought to know; or

(d) in respect of which the licensed insurer has waived any requirement for disclosure.

(3) Where a proposer fails to answer or gives an incomplete or irrelevant answer to a question contained in the proposal form or asked by the licensed insurer and the matter was not pursued further by the insurer, compliance with the proposer's duty of disclosure in respect of the matter shall be deemed to have been waived by the insurer.

(4) A licensed insurer shall, before a contract of insurance is entered into, varied or renewed, clearly inform a proposer in writing of the proposer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

Pre-contractual duty of disclosure for consumer insurance contracts

5 (1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

(2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1).

(3) Before a consumer insurance contract is renewed, a licensed insurer may either —

(a) request a consumer to answer one or more specific questions in accordance with subparagraph (1); or

(b) give the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request the consumer to confirm or amend any change to that matter.

(4) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subsubparagraph (3)(a), or confirming or amending any matter under subsubparagraph (3)(b).

(5) If the licensed insurer does not make a request in accordance with subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under subparagraph (1) or subsubparagraph (3)(a), or fails to confirm or amend any matter under subsubparagraph (3)(b), or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing of the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

(8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

(9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[30] In relation to a non-consumer insurance contract, a proposer shall disclose to the licensed insurer a matter that: (a) he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied; or (b) a reasonable person in the circumstances could be expected to know to be relevant. Whereas in the case of a *consumer insurance contract, it is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions.* The policy speech of the then Deputy Finance Minister I, Datuk Dr Awang Adek Hussin, when introducing the Financial Services Bill provided the reason why

Parliament had enacted the Bill which created such distinct classes as aforesaid: A

> Keenam, rang undang-undang ini akan menyediakan rangka kerja yang kukuh bagi perlindungan pengguna kewangan. Ini dicapai melalui:
>
> (i) ...;
>
> (ii) ...; B
>
> (iii) ...;
>
> (iv) memperuntukkan tanggungjawab penanggung insurans untuk memberi panduan kepada pengguna mengenai penzahiran yang diperlukan semasa peringkat pra kontrak dalam hal salah nyata atau misrepresentation yang dibuat oleh pengguna. C
>
> Rang undang-undang ini memperuntukkan remedi bagi penanggung insurans yang lebih saksama bergantung sama ada salah nyata oleh pengguna tersebut dibuat secara sengaja atau melulu, cuai, atau tidak sengaja.
>
> Pada masa sekarang, kontrak insurans boleh dielak, *avoidable* secara langsung oleh penanggung insurans tidak kira sama ada salah nyata oleh seseorang pengguna tersebut dibuat secara sengaja atau melulu, cuai atau pun tidak sengaja. D
>
> ((Dewan Rakyat Hansard) [DR 27.11.2012] at 1810)

[31] The SCJ in para 197 (defendant 2's grounds of judgment) stated that E the *policy was a consumer contract* and this was in relation to the claim by the plaintiff against defendant 2 which allegedly had submitted it was a non-consumer contract. Upon perusal of defendant 2's submission, I found that this was misconceived by the plaintiff as defendant 2 contended it was clearly a consumer insurance contract. The defendants submitted on the F importance of disclosure and the court had analysed this issue in paras 184 onwards. Specifically, I refer to the following paragraphs of the SCJ's analysis for ease of reference:

> [197] *Polisi Kemalangan Diri Ultima V3-Plan 05 ini adalah suatu polisi Kontrak Insurans Pengguna (Consumer Insurance Contract, di muka surat 85 Ikatan D) dan satu notis penting ('Important Notice') telah diberikan kepada Plaintif yang berniat memohon insurans* yang memperuntukkan dalam borang cadangan (eksh P32 (m/s G 11 encl 9, dan ekshibit P32 di muka surat 85 Ikatan D), bahawa:
>
> > Kontrak Insurans Pengguna H
> >
> > Menurut Perenggan 5 Jadual di bawah Akta Perkhidmatan Kewangan 2013, sekiranya anda memohon Insurans ini sepenuhnya bagi tujuan yang tidak berkaitan dengan perdagangan, perniagaan atau profesion anda, anda mempunyai kewajipan mengambil penjagaan munasabah supaya tidak membuat salah nyataan semasa menjawab soalansoalan di dalam borang cadangan dan/atau semua soalan-soalan yang dikehendaki oleh Syarikat dengan penuh dan tepat dan mendedahkan apa-apa perkara lain yang anda ketahui berkaitan dengan keputusan kami dalam menerima risiko dan dalam menentukan kadar dan terma yang hendak dipakai, jika sebaliknya ini boleh menyebabkan kontrak terbatal, penolakan atau pengurangan tuntutan, I

penukaran terma atau penamatan kontrak.

Anda juga mempunyai kewajipan memaklumkan kepada kami dengan segera sekiranya pada bila-bila masa, selepas kontrak insurans dibuat, diubah atau diperbaharui dengan pihak kami, sebarang maklumat yang diberikan adalah tidak tepat atau telah berubah.

[32] In regard to the defendant 2's policy, that policy covered work-related accidents; this can be gathered from the evidence of SD3 and the absence of an exclusion clause of work-related accidents in the policy (exclusion clause No 7 only excludes subordinates not the life insured). This could attract the definition of consumer insurance policy having regard to the intention of the plaintiff (where he alleged the policies served as an incentive to his employees) and the evidence of SD3 itself.

[33] It is noted that para 10 of Schedule 9 is only applicable to consumer insurance contract and renders any basis clause in a consumer insurance contract of no effect. It reads:

Any representation made before a consumer insurance contract was entered into, varied or renewed shall not be converted into a warranty by means of any provision of the consumer insurance contract or of any terms of the variation or of any other contract, whether by declaring the representation to form the basis of the contract or otherwise.

[34] In the analysis of the evidence before me, as the policies do not cover work-related accidents, the policies were unrelated to the individual's trade, business or profession, and therefore, they come within the ambit of the definition of a consumer insurance contract. Notwithstanding the plaintiff's assertion, as well as the evidence of SD1, the construction of the policies prevailed as it was in accordance with the intention of Schedule 9.

[35] It was evident from grounds of judgment of the *SCJ she had concluded that the policies were consumer insurance contracts.* But the SCJ also stated in para 200 that the *proposal form did form the basis clause of the contract* with the insurer as follows:

[200] Dalam kes ini, plaintif telah mengesahkan bahawa semua maklumat yang dinyatakan dalam borang cadangan itu (yang dibuat tanpa pendedahan tentang polisi pelbagai jenis dengan penanggung insurans lain) merupakan maklumat penuh, lengkap dan benar dan merupakan asas bagi pembentukan kontrak insuran dengan defendan. Ternyata, borang cadangan yang membentuk kontrak insurans ditandatangan oleh plaintif sendiri (merujuk di muka surat 87 Ikatan D dalam encl 45) yang memperaku dan memberi perisytiharan bahawa semua butiran (yang diisikan ejen bagi pihaknya) adalah benar. Yew Kai Chong (ejen insurans Berjaya Sompo Insurance) hanya diminta untuk mengisi borang cadangan. Sehubungan

itu, Plaintif adalah terikat dengan perisytiharan dan bersetuju bahawa Cadangan itu dijadikan dasar kontrak di antara pihak-pihak ('klausa asas') (eksh P31, merujuk di muka surat 88 Ikatan D dalam encl 45).

(iii) Does the basis clause apply if the court finds that the contract of insurance is a consumer insurance contract

[36] The SCJ discussed the merits of the basis clause in analysing the evidence as can be seen above. Does this mean that automatically her grounds of judgment is totally wrong by virtue of para 10 of Schedule 9? I think not.

[37] In the case of *Chong Lai Keng (sue as nominee to life assured in Prudential Policy No 35192844 and 35201115, Than Poo Ling (deceased)) v Prudential Assurance Malaysia Bhd* [2023] MLJU 2430; [2024] 1 CLJ 293, the facts were similar on the issue of the insured person had not disclosed to the proposed insurers the existence of a few other policies. The learned judicial commissioner Jamhirah bt Ali stated:

[48] As previously elucidated, *para 5 of Schedule 9 of the FSA which pertains to the pre-contractual duty of disclosure for consumer insurance contracts, imposed a statutory duty on the consumer to exercise reasonable care in avoiding any misrepresentation to the insurer. This duty was especially significant when responding to specific questions posed by the insurer, which were essential in the insurer's determination of whether to accept the risk and in establishing the applicable rates and terms.* The principle of *uberrimae fidei* remained applicable to the parties involved in an insurance contract. In accordance with this principle, the consumer was held to a standard of care defined as that of a 'reasonable consumer'. *Consequently, based on the underpinning of uberrimae fidei, the life assured, as the consumer, bore the duty of utmost good faith, necessitating full disclosure of all material facts within his knowledge.* In *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710; [2006] 1 CLJ 1, the Court of Appeal held as follows:

> [15] It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fides* towards each other. *On the part of the insured, he or she must make full disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material. The duty is on the insured to make full disclosure of material facts within his knowledge.* (Emphasis added.)

[49] After careful examination of the evidence, the submitted documents, and the relevant law, I concluded that the existence of the three AIA policies constituted a 'material fact'. This finding stemmed from the evidence that their disclosure would have had a negative impact on the defendant's underwriting decision. If the defendant had been aware of the three AIA policies, they would not have issued the policies in question. Further, based on the factual circumstances and the sequence of events in this case, I concluded that the life assured had deliberately concealed or suppressed and had fraudulently misrepresented the existence of the three AIA policies. (Emphasis added.)

[38] The court refers to the provision in para 6 of Schedule 9 which provides the following:

> Duty to take reasonable care
>
> 6 (1) In determining whether a consumer has taken reasonable care not to make a misrepresentation under subparagraph 5(2) or (4), the relevant circumstances may be taken into account including —
>
> (a) the consumer insurance contract in question and the manner in which the contract was sold to the consumer;
>
> (b) any relevant explanatory material or publicity produced or authorized by the licensed insurer; and
>
> (c) how clear and specific, the licensed insurer's questions were.
>
> (2) Subject to subparagraph (3), the standard of care required of the consumer under subparagraphs 5(2) and (4) shall be what a reasonable consumer in the circumstances would have known.
>
> ...

[39] Although the third issue is to be answered in the negative, based on the construction of para 6 of Schedule 9 as well as Division 2 which will be analysed later I am of the view that the court still has a duty to evaluate the evidence and make a finding whether there has been misrepresentation at the point of submission of the proposal form.

(iv) If the court finds that it is a consumer insurance contract, whether there has been compliance by the parties with the whole prosess or procedure under para 5, Part II Schedule 9 of the Financial Services Act 2013 (Act 758) including the duty of disclosure

[40] It was the plaintiff's contention that the defendants had waived the plaintiff's duty of disclosure as the insurers did not make a request in accordance with sub-para (1) or (3) of paras 5(5) and/or 5(6). Moreover, para 5(7) requires a licensed insurer, before a consumer insurance contract is entered into, varied or renewed, to clearly inform the plaintiff in writing of the consumer's pre-contractual duty of disclosure and that this duty of disclosure shall continue until the time the contract is entered into, varied or renewed.

[41] I will deal with the fourth and fifth issues together; the fifth issue was whether the plaintiff received any notice in writing in respect of the pre-contractual duty to disclose prior to entering into the contract of insurance:

> [211] ... *Notis juga diberikan kepada plaintif bahawa 'Jika Plaintif tidak memberikan maklumat ini dengan sepenuhnya dan sejujurnya, polisi insurans mungkin tidak sah atau Polisi mungkin tidak melindungi orang yang diinsurankan/pekerja dengan*

sepenuhnya'. Tiada sebab untuk mahkamah ini menyimpang daripada kedudukan undang-undang am mengenai kewajipan pendedahan fakta yang material di pihak plaintif.

[212] Saya juga bersetuju dengan hujah peguam defendan bahawa hujah-hujah peguam plaintif adalah tidak bermerit dan tidak selari dengan pemakaian perenggan 5 Jadual Kesembilan Akta 758 (rujukan kepada kes: *Balamoney Asoriah v MMIP Services Sdn Bhd* [2019] MLJU 2172; [2020] 1 CLJ 476) mengenai kewajipan untuk mengambil langkah yang munasabah untuk tidak salah nyata dalam menjawab soalan yang terdapat dalam borang cadangan (atau semasa permohonan insurans ini) dan perlu menjawab soalan-soalan dengan penuh dan tepat. Kegagalan dalam mengambil langkah munasabah dalam menjawab soalan-soalan boleh mengakibatkan pembatalan kontrak insurans, keengganan atau pengurangan gantirugi, perubahan terma atau penamatan kontrak insurans selaras dengan remedi di Jadual 9 Akta Perkhidmatan Kewangan 2013 (Akta 758). Plaintif juga dikehendaki mendedahkan perkara-perkara lain yang dia tahu akan mempengaruhi keputusan defendan dalam menerima risiko dan menentukan kadar dan terma yang akan dikenakan.

...

[215] Pada setiap masa yang material, plaintif mendakwa dia tidak diperjelaskan tentang kandungan dalam borang dan tidak ditanyakan tentang lain-lain polisi yang dia ada miliki sewaktu ejen mengisikan borang cadangan bagi polisi insurans Kemalangan Diri Peribadi Ultima V3 — Plan 05 (merujuk penyata saksi dalam encl 74 yang hanya difailkan pada 13 Mei 2020 dan Plaintif memberi keterangannya pada 18 September 2020). *Dalam kes ini, plaintif mengelakkan diri dari bertanggungan untuk menzahirkan pegangan polisi insurans yang dipegangnya dengan mendakwa dia menurunkan tanda tangan atas borang sebelum ejen Yew Kai Chong mengisikan butiran dan dia tidak fasih membaca dalam Bahasa Malaysia atau Bahasa Inggeris dan khidmat ejen insurans digunakan bagi mengisi borang. Pada setiap yang material, Plaintif mendakwa dia tidak diperjelaskan tentang kandungan dalam borang dan tidak ditanyakan tentang lain-lain polisi yang dia ada miliki sewaktu ejen mengisikan borang cadangan bagi polisi insurans Kemalangan Diri Peribadi Ultima — Plan 05. Tidak ada keterangan menyokong dipanggil dari pihak ejen Yew Kai Chong mengenai dakwaan plaintif yang dibuatnya.*

[42] The SCJ did apply *Balamoney a/p Asoriah (lawful mother and next friend of Jayandran a/l Mathan, a minor) v MMIP Services Sdn Bhd* [2019] MLJU 217 which has been affirmed by the Federal Court in the case of *AmGeneral Insurance Bhd v Sa' Amran a/l Atan & Ors and other appeals* [2022] 5 MLJ 825; [2022] 8 CLJ 175. With respect, I am of the view that the Federal Court case above did not directly apply to the present case because there the issue again was in respect of avoiding liability under s 96(3) of the RTA and it concerned third party insurance. One of the issues was whether the insurer could avoid liability when the vehicle that was involved in an accident had been sold/transferred to another party. The issue in that Federal Court case can be compared with the facts in *Balamoney*'s case.

[43] The SCJ found that the plaintiff claimed that the notice was never explained to him but also found that he had willfully ignored the notice. Pursuant to the paragraphs above, since the plaintiff had acknowledged that the notice was explained to him and regardless of his intention of what kind of policy he actually wanted to purchase, *this court found that the defendants had sufficiently discharged their burden under Schedule 9 to explain to the proposer of his duty of disclosure in writing.* The SCJ found further that the plaintiff had failed to disclose that he had two other insurance policies other than with defendant 3 which was stated in the proposal form. In the case of defendant 2 he had omitted to fill in the question. I have no reason to disturb her finding that there was nondisclosure of the existence of the other two policies on the part of the plaintiff. The question is, does this amount to a breach in his duty of disclosure? I refer to the case on *uberrima fide* as stated in *Leong Kum Whay v QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 MLJ 710; [2006] 1 CLJ 1 where Gopal Sri Ram JCA propounded:

> [15] *It is settled beyond dispute that a contract of insurance is one that imposes mutual duty on the parties to it to act uberrimae fides towards each other … On the part of the insured, he or she must make full and frank disclosure of all material facts. It is not for him or her to decide in his or her own mind what is material … The duty is on the insured to make full disclosure of material facts within his knowledge.*
>
> …
>
> [19] So much for the insured's duty. For completeness I would add that there is a corresponding duty on the part of an insurer to act with utmost good faith towards its insured. In *Maschke Estate v Gleeson* (1986) 54 OR (2d) 753 at p 756, Montgomery J put the duty in this way:
>
> > A contract of insurance is one of *uberrimae fides*, the utmost of good faith. This is not a situation where an insurer is indemnifying its assured and paying a third party. This is a case where the insurer is being asked to pay its own insured. The duty to act promptly and in good faith arises the day the insurer receives the claim. To find otherwise is to fail to understand the realities of the market place. (Emphasis added.)

[44] The principle of *uberrimae fidei* has been entrenched in para 5 of Schedule 9 as well, with some modification where a consumer no longer needed to voluntarily disclose information to the insurer but only to give information that was requested upon him, with reasonable care, to the insurer. The plaintiff alleged that he had omitted to fill all of the policy because the insurer's agent did not explain the question to him which led him to not completely filling them as he was not conversant in English. *Later he said he was unsure whether the agent explained the questions in the proposal form.* His counsel had contended that the plaintiff did not breach the *uberrima fide duty* because, by virtue of para 5(6), an incomplete information that was not further pursued by the insurer was deemed waived, as pointed out earlier.

[45] I refer to the relevant paragraphs in the SCJ's grounds of judgment for effect:

A

[198] Merujuk kepada borang cadangan (eksh P32) bagi memperoleh polisi insurans Kemalangan Diri Peribadi Ultima — Plan 05 yang hendak diisu oleh Defendan, soalan 6 (eksh 32, merujuk muka surat 86 Ikatan D) menanya kepada Plaintif tentang permohonan serupa atau pembaharuan polisi kemalangan diri atas nama orang yang diinsurankan, Raja a/l Krishnan:

B

> Have you or any person to be insured ever had an application for life or Personal Accident Insurance accepted with Sum Insured reduced or the renewal premium increased?' dan dijawab oleh ejen 'No'.

C

[199] *Jawapan kepada soalan 6 ternyata tidak benar atau tidak tepat kerana dokumen yang dikemukakan oleh plaintif dalam Ikatan D (dalam encl 45 difailkan dalam Saman AB-A52NCC-7–05 of 2019 berikutan perintah gabung dengar bertarikh 17/09/2019 dan 16/10/2019) yang melibatkan 4 penanggung insurans, ternyata bahawa polisi perlindungan takaful ada dalam pegangan plaintif sejak Disember 2016 tetapi pemerolehan polisi perlindungan kemalangan diri takaful berkelompok bertarikh 4 January 2017 yang juga melindungi penama Raja a/l Krishnan ini tidak pernah dimaklumkan kepada defendan dan pemerolehan dua lagi polisi insurans kemalangan diri atas nama Raja a/l Krishnan juga gagal didedahkan oleh plaintif.*

D

...

E

[201] Peguam defendan berhujah bahawa beban pendedahan penuh dan tepat oleh plaintif adalah dari permulaan kontrak insuran dimasuki dan beban itu akan berterusan sehingga tempoh kuatkuasa perlindungan insuran luput. la adalah undang-undang matan bahawa kewajipan pihak yang diinsuranskan untuk mendedahkan maklumat material kepada penginsurans merupakan kewajipan yang wujud secara berasingan daripada apa-apa borang cadangan (kes: *Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor* [2011] 8 MLJ 556 dan *American International Assurance Co, Ltd v Nadarajan a/l Subramaniam* [2013] 5 MLJ 195).

F

[202] Di bawah tajuk 'Kewajipan Pendedahan'; (di muka surat 88/(BM) muka surat 98 Ikatan D) dalam Polisi Kemalangan Diri Ultima VS-Plan 05 (eksh PS1 di muka surat 98 Ikatan D), diperuntukkan bahawa:

G

> Apabila Orang yang Diinsuranskan telah memohon insurans ini sepenuhnya bagi tujuan yang tidak berkaitan dengan perdagangan, perniagaan atau profesion Orang yang Diinsuranskan, Orang yang Diinsuranskan mempunyai kewajipan mengambil penjagaan munasabah supaya tidak membuat salah nyataan semasa menjawab soalan-soalan di dalam borang cadangan (atau semasa membuat permohonan Insurans ini). Orang yang Diinsurans perlu menjawab soalan dengan penuh dan tepat. Kegagalan dalam mengambil langkah yang munasabah dalam menjawab soalan-soalan boleh mengakibatkan pembatalan kontrak Insurans, keengganan atau pengurangan ganti rugi, perubahan terma atau penamatan kontrak Orang yang Diinsurans selaras dengan remedi di Jadual 9 Akta Perkhidmatan Kewangan 2015.
>
> Orang yang Diinsurans juga dikehendaki mendedahkan apa-apa perkara lain yang Orang yang Diinsurans tahu akan mempengaruhi keputusan Syarikat

H

I

dalam menerima risiko dan dalam menentukan kadar dan terma yang dikenakan.

Orang yang Diinsurans juga mempunyai kewajipan untuk memberitahu Syarikat dengan serta merta jika pada bila-bila masa selepas kontrak insurans Orang yang Diinsurans ditanda tangani, diubah atau diperbaharu dengan Syarikat, apa-apa maklumat yang diberikan dalam borang cadangan (atau semasa membuat permohonan Insurans ini) tidak tepat atau telah berubah.

[203] Berdasarkan terma polisi di atas, plaintif juga mempunyai kewajipan untuk memberitahu defendan dengan serta-merta jika pada bila-bila masa selepas kontrak insurans ditandatangani, diubah atau diperbaharui dengan defendan, apa-apa maklumat yang diberikan di dalam borang cadangan (atau semasa permohonan insurans ini) tidak tepat atau telah berubah. Kewajipan untuk mendedahkan fakta material, dan kewajipan tersebut tidak dilepaskan semata-mata atas akuan fakta bahawa pihak yang satu lagi telah gagal menanya mengenai fakta material yang tidak didedahkan, tetapi fakta pemerolehan polisi-polisi yang lain adalah, pada setiap masa yang material dalam pengetahuan pihak Plaintif, bukan ejen yang mempunyai pengetahuan tersebut. Dalam mempertimbangkan hujah mengenai fakta yang dipli dalam pembelaan berkaitan borang cadangan, tidak pernah berbangkit isu sama ada borang cadangan diisikan oleh ejen bagi pihak plaintif.

[204] Merujuk kes *Tan Jing Jeong v Allianz Life Assurance Malaysia* [2012] 7 MLJ 179; [2011] 4 CLJ 710 mengenai kewajipan berterusan di pihak-pihak di bawah kontrak insurans, bahawa:

Sebaik sahaja kewajipan positif diberikan kepada sesuatu pihak oleh undang-undang untuk bercakap benar, termasuk untuk mendedahkan fakta material, kewajipan tersebut tidak dilepaskan semata-mata atas akuan fakta bahawa pihak yang satu lagi telah gagal menanya mengenai fakta material yang tidak didedahkan, tetapi fakta yang dalam pengetahuan pihak yang mempunyai pengetahuan tersebut.

...

[218] ... *Berdasarkan jawapan yang diberi kepada soalan dalam penyata saksi SP7 (encl 74 dalam Saman AB-A52NCC-7–05 Tahun 2019) dan semasa pemeriksaan balas pada 23/09/2020 oleh peguam Defendan, dihujahkan bahawa jawapan kepada isu yang membangkitkan kewajipan pendedahan pemerolehan polisi-polisi (dipli dalam perenggan 3 dan 6 encl 7) adalah satu pemikiran terkemudian untuk membangkitkan pembelaan pada tahap ini.* Namun apabila Plaintif memberi keterangan pada 18 September 2020 dan 23 September 2020 mengenai dokumen polisi yang hendak dijadikan asas tuntutannya terhadap defendan-defendan, syarikat penanggung insurans terlibat, atau semasa disoal balas mengenai butir lanjut nama pekerja yang disenarai dalam polisi Takaful, siapa pekerjanya yang diberikan manfaat di bawah polisi-polisi yang diambilnya dengan Takaful Malaysia dan jumlah perlindungan takaful bagi empat pekerjanya (yang ada kaitan tali persaudaraan dengannya) selain Raja a/l Krishnan, *dirumuskan bahawa plaintif adalah seorang peniaga yang sangat cerdik, yang celik angka/ matematik kerana dalam setiap polisi yang dibeli olehnya sebagai majikan, dia yang memainkan peranan yang penting dalam memperolehi fakta dan angka untuk dimasukkan dalam polisi; pihak plaintif juga yang membayar premium bagi orang yang diinsuranskan bagi kesemua*

polisi atas penama yang sama iaitu Raja a/l Krishnan (si mati). Sekiranya terjadi kematian kemalangan menimpa pekerjanya Raja a/l Krishnan, jumlah pampasan yang akan dipungutnya akan mencecah RM1 juta. Semasa disoal balas peguam, plaintif mengatakan insurans yang diperoleh itu mungkin tidak diketahui oleh ahli keluarga Raja a/l Krishnan. *Oleh itu, fakta material mengenai polisi-polisi yang dipegang plaintif sememangnya dalam pengetahuannya pada setiap masa yang material, bukan ejen insurans.* Malah adalah satu perkara yang mustahil dan/atau subjektif untuk ejen mengetahui apakah yang perlu didedahkan pada masa mengisikan borang cadangan bagi pihak plaintif.

[219] *Plaintif hadir ke mahkamah tidak secara suci hati kerana plaintif tidak benar-benar menjelaskan bagaimana beliau boleh memperoleh polisi-polisi insurans yang dipegangnya. Plaintif lazim memberi jawapan menyatakan bahawa dia tidak tahu (atau sengaja mengabaikan 'Notis Penting' yang tertulis dalam dokumen kesemua polisi yang diperoleh) tentang kewajipan mengambil penjagaan munasabah supaya tidak membuat salah nyataan mengenai risiko yang berkaitan perlindungan yang hendak diberi atas seorang pekerja sahaja iaitu, Raja a/l Krishnan.* Plaintif mengelakkan kewajipannya membuat pendedahan atau kewajipan memberi maklumat tepat tentang pemerolehan polisi-polisi dengan meletakkan beban ke atas tiga ejen insurans yang didakwa gagal menerangkan 'Notis Penting' dalam dokumen polisi dan/atau kandungan notis tidak dalam pengetahuannya disebabkan ejen insurans yang membantunya memperoleh polisi-polisi insurans dalam milikannya itu gagal menanyakan soalan-soalan material kepadanya, terutamanya berkaitan pemegangan lessen memandu yang sah oleh Raja a/l Krishnan. Semasa disoal balas peguam-peguam yang mewakili Defendan-defendan pada 18 September 2020 dan 23 September 2020, plaintif mengatakan kandungan polisi yang diperolehnya terutamanya mengenai terma pengecualian itu tidak pernah dijelaskan oleh ejen insurans kepadanya.

[46] The plaintiff contended that the SCJ misdirected herself when she applied *Tan Mooi Sim & Anor v United Overseas Bank (M) Bhd & Anor* [2011] 8 MLJ 556 which was decided before Act 758 was enacted by Parliament. Nevertheless, Act 758 did not abolish the duty to disclose by the consumers but rather, it had codified the duty and made it an offence under s 129(2) of Act 758 if a person contravened the duty of disclosure under para 11 of Schedule 9. The SCJ had made her findings of fact that the plaintiff has not abided by the *uberrimae fidei* duty and that his version was an afterthought. But para 5(6) provided if the disclosure was not pursued further by the insurer, it was deemed waived. The burden to prove the matter lies on the defendants. In *Balamoney*'s case, the Court of Appeal stated:

[49] Under sub-subparas 5(3)(a) and (b), the respondent may do either of two things when there is an application to renew the insurance policy. The respondent may request Selvamani or whoever was renewing the insurance policy to answer one or more specific questions in accordance with sub-para (1). The questions asked being specific questions that are relevant to the respondent's decision whether or not to accept the risk, and the rates and terms to be imposed. Alternatively, the respondent may give Selvamani or whoever was renewing the insurance policy, a

A copy of any matter previously disclosed by Selvamani in relation to the contract and request Selvamani or whoever was renewing the insurance policy, to confirm or amend any change to the matter.

[50] Where the respondent makes either of these requests, Selvamani or whoever was renewing the insurance policy, has a duty under sub-para 5(4) 'to take B reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under sub-subpara (3)(a), or confirming or amending any matter under sub-subpara (3)(b)'.

C **[47]** From the facts of the case and findings of the SCJ, I found that the defendants have discharged this burden of proof. Counsel for defendant 2 referred to the decision in *Tan Siew Wei v Great Eastern Life Assurance (Malaysia) Bhd* [2021] MLJU 1909; [2021] 1 LNS 770, *Liberty Insurance Bhd v Marrison ak Sidai & Anor* [2019] 12 MLJ 763; [2019] 8 CLJ 380, *Etiqa General Takaful Bhd v Personal Representative of Fatimah bt Adam, deceased & D Ors* [2022] 11 MLJ 494; [2022] 6 CLJ 385 and *Ulaganathan a/l Muthiah v Prudential Assurance Malaysia Berhad* [2020] MLJU 210; [2020] 9 CLJ 435 in support of its case on the issue of pre-contractual disclosure and I agreed with the rationale of the learned Justices of the High Courts in the abovementioned cases.

E

[48] In my broad grounds earlier, I had distinguished *Balamoney*'s case. I now give my reasons for doing so. I am of the view that the facts of that case warranted the Court of Appeal to intervene and grant the remedy that should have been granted to the appellant, unlike the present case. The facts were as F follows:

On 28 October 2016, Jayandran Mathan ('Jayandran'), a minor, was riding pillion on a motorcycle which was involved in a collision with a motor van driven by the first defendant and owned by the deceased ('Selvamani'). Jayandran's mother ('the appellant') decided to sue on her son's behalf. As required under s 96(3) of the Road G Transport Act 1987 ('Road Transport Act'), she served a notice on the insurer ('the respondent') prior to the filing of the suit ('the civil suit'). It was, however, discovered that Selvamani had passed away on 20 April 2016, well before the accident. It was also discovered that the insurance policy that Selvamani had taken with the insurers ('the policy') had expired on 4 May 2016, after his demise. The H policy was nevertheless renewed in Selvamani's name from 10 May 2016 to 9 May 2017. The respondent filed an originating summons before the High Court seeking declaratory orders to the effect that it was not the insurer of the said motor van at the time of the accident; and that the insurance policy was null and void by reason of a fundamental breach of the principle of *uberrimae fidei* or duty of utmost good faith, I the breach of which entitled the respondent to void the insurance contract. The High Court, in granting the respondent's application, held that when the material fact that Selvamani had already passed away was not disclosed to the insurer at the time the insurance policy was renewed by whoever had done the renewal, there was a breach of the principle of utmost good faith which entitled the insurer to void the renewed policy. Hence, the appellant appealed against the decision of the High

Court. Held (allowing the appeal and setting aside the judgment of the High Court):

(1) The declaratory orders sought by the respondent concerned the status and validity of the insurance contract made not between the parties, but between the respondent and Selvamani, who was not a party in the appeal. *Given the nature of the issue, its determination by way of an exchange of affidavits and with the critical parties not before the court was not appropriate. The respondent's allegations of misrepresentation by Selvamani or by whoever had renewed the insurance policy without evidence of the circumstances as to how or when the insurance policy was actually renewed were necessarily questions of mixed fact and law; and the issue certainly involved Selvamani as well as the driver of the motor van. Further, no reasons were proffered as to their absence or lack of participation in the proceedings before the High Court. The appellant, who was not a party to the insurance policy, was not in the position to answer or even deal with the issue(s) posed by the respondent.* The circumstances and conditions surrounding the renewal were clearly beyond the capacity and remit of the appellant to address, let alone answer. Hence, such applications ought not to be dealt with in the manner done, especially where the relevant and necessary parties were not before the court. (paras 21–23)

...

(4) The respondent had not discharged its burden of proof under s 129 read together with Schedule 9 of the Financial Services Act so as to be entitled to the discretionary remedies. It never posed any questions to Selvamani or whoever was renewing the policy. This court did not see how just the fact that Selvamani was deceased *ipso facto* invalidated the renewed policy. This was incorrect. The whole process or procedure under Schedule 9 must be complied with and answered. *There was no evidence at all of the respondent doing any of the matters that were mentioned in Schedule 9, especially sub-para 5(3) nor of the judge addressing these critical matters. Under such conditions, it was not open to the respondent to approach the court and complain that there was misrepresentation.* The failure of the trial judge to apply s 129 and Schedule 9 was sufficient reason for this court to intervene and set aside the decision of the trial judge granting the declaration sought under s 96(3) of the Road Transport Act 1987 (paras 48, 52 & 53)

(5) Devoid of any compliance of the mandatory requirements emplaced under s 129 and Schedule 9 of the Financial Services Act, the respondent was not at all entitled to the orders granted by the High Court. It would be in direct contravention of s 129 and Schedule 9 of the Financial Services Act were this court to condone such breaches. *It would bring untold injustice and prejudice to innocent third parties such as the appellant in this appeal, the parties who were the intended recipients of the benefits behind ss 90 and 96 of the Road Transport Act 1987 and s 129 of the Financial Services Act. There was no basis for the exercise of discretion in granting the declarations sought by the respondent.* In fact, it would be unjust for the court to grant such orders. (paras 60 & 63). (Emphasis added.)

[49] The highlighted parts are the distinguishing features of that case with

the present case. The SCJ in this case had heard all the evidence in a *full trial* and parties had been given the opportunity to fully ventilate their issues before the judge, unlike in *Balamoney*'s case which was by way of exchange of affidavits (presumably by way of an originating summons application). In regard to the last point above, clearly there had been injustice to the victim's family where a declaration under s 96(3) of the RTA was granted and liability avoided in respect of a third-party insurance such as in that case. I would just add further that in *Balamoney*'s case, the Court of Appeal did mention that misrepresentation is fact sensitive:

> [45] As can be seen from sub-para 7(4), much will depend on knowledge on the part of Selvamani or whoever renewed the insurance policy at the material time. *Whether misrepresentation exists is therefore very much fact sensitive, confirming our earlier opinion on the unsuitability of how the whole application was conducted by the High Court. The burden is on the respondent to prove the existence of misrepresentation; that it would not have entered into or renewed the insurance policy had it been aware of the true facts; and we have no information as to when the policy was actually submitted for renewal and the circumstances of the renewal.* (Emphasis added.)

[50] In the present case, having gone through the notes of evidence in the records of appeal I found that the SCJ had not made any error in her assessment of the facts and evidence adduced by the plaintiff and her observations in regard to the surrounding circumstances of the manner in which the policies were renewed. It was the plaintiff's contention that he took out the policies as an incentive to his employees but I found that the 'bulk' of the policies amount payable, RM840,000 was made under the name of the deceased alone (three of the policies, except Takaful). He also admitted that the deceased's family members did not know about the policies taken in the name of the deceased and he did not know them personally (the family members). *It appeared that the only beneficiary of the group policy was the plaintiff.*

[51] The plaintiff contended that the absence of a valid licence/road tax/insurance were trivial matters. He also contended that the deceased's occupation was a lorry driver and therefore, the absence of a valid motorcycle licence/road tax/insurance was irrelevant to his death. I agree with the defendants' submissions that these were not trivial matters as it would in effect have a bearing on the decision of the insurers to take on the risk of providing coverage for the deceased who was not in possession of a valid licence. The absence of of a valid licence was specifically spelt out in their respective exclusion clauses. This also constituted an 'unlawful act' under the policies thereby triggering the exclusion clause therein: *Allianz General Insurance Malaysia v KL Chan & Assoc* [2017] 6 MLJ 351; [2017] 8 CLJ 517 (COA).

[52] I am mindful of SD3's evidence that the insured person need not possess a valid licence at the point of time when the proposal form was submitted as he

could obtain one later. What was important for the insurers would be at the time when a claim was submitted (for instance due to death of the insured person), whether there was any breach of the law ie he had been riding without a valid licence. SP6's evidence admitted the motorcycle was without a valid insurance and road tax. Therefore, SP6 had breached the provisions of ss 26(1), 15(1) and 90(1) of the RTA.

[53] *The plaintiff contradicted himself when he stated that the deceased was employed as a lorry driver but the evidence was that he would drive 'the lorry driver' to work in the oil palm plantation.* Obviously, the court can conclude that the plaintiff had to do so as he *was fully aware of the fact that the deceased did not possess a valid driving licence*. He condoned this situation and it was clearly against the provision of s 26(1) of the RTA 1987. *On a balance of probability, I found the plaintiff's evidence, that if he had known the deceased did not possess a valid licence he would have asked the deceased (then) to obtain one, was inherently improbable.* The plaintiff drove the deceased to work probably almost everyday (three times weekly), it was highly improbable that he did not know or have the opportunity to ask the latter about it.

[54] A person employed as a lorry driver must possess a valid and full licence to drive and operate such a 'potentially dangerous' vehicle. A motorcycle rider too must have a valid licence to ride, even if it was just an L-licence. That is a requirement of the law and it is proof of one's capability and qualification to operate a vehicle be it a motorcycle, car, lorry, bus or whatever. The courts should not condone the illegal behaviour of riding a motorcycle or driving a motor vehicle without a valid licence, insurance and road tax. The RTA is in place to ensure the safety of all road users. Full-stop. On this ground alone, I found that the defendants were entitled to rely on this exclusion clause (riding/driving without a licence) to repudiate their respective liabilities: *Lee Boon Siong v Great Eastern Life Assurance (Malaysia) Berhad* [2020] MLJU 1376.

[55] Therefore, separately from the duty of disclosure in respect of the deceased's non-possession of a valid licence, I found that the plaintiff was not forthcoming about the reason why he wanted to purchase the policies under the name of the deceased who did not possess a valid licence when the plaintiff claimed that he (the deceased) was employed as a lorry driver: *Ulaganathan a/l Muthiah*'s case. This will be discussed further later in this grounds of judgment.

[56] I have answered issues (iv) and (v) in my analysis above. The plaintiff as early as at the time when the Proposal Form had been filled up had not complied with the procedures under Paragraph 5, Schedule 9 to take care when making the representation whereas the defendants had complied with the provisions of the law.

(v) Can the defendants be allowed to rely on a new ground which was never raised in the repudiation letter rejecting the plaintiff's claim

[57] The new ground was the attempt by the defendants to avoild liability by relying on SPI's (and to a certain extent SP5) evidence that the deceased was not wearing a helmet. The repudiation letters all stated that the insurers would not make the payment despite the plaintiff's claims because the deceased was found to be riding a motorcycle without a valid licence. This sixth issue was a non-issue as the court found the exclusion clauses for each of the four insurers pertaining to riding a motorcycle without a valid licence was sufficient to enable the insurers to repudiate liability.

[58] I refer to para 7(1)(b) of Schedule 9 which is applicable here and it provides:

> Misrepresentation in respect of insurance contracts
>
> 7 (1) Part 3 of this Schedule —
>
> (a) in Division 1, makes provision for a misrepresentation made in relation to a contract of life insurance, whether or not a consumer insurance contract, which has been effected for a period of more than two years; and
>
> (b) *in Division 2, sets out the remedies available to a licensed insurer for a misrepresentation made in respect of —*
>
> (i) *a consumer insurance contract of life insurance which has been effected for a period of two years or less; and*
>
> (ii) *a consumer insurance contract of general insurance.*
>
> (2) The remedies set out in Division 2 shall be available to a licensed insurer for a misrepresentation made by a consumer before a consumer insurance contract referred to in subsubparagraph (1)(b) was entered into, varied or renewed if —
>
> (a) the consumer has made a misrepresentation in breach of his duty under subparagraph 5(2) or (4); and
>
> (b) the licensed insurer shows that had it known the true facts, it would not have entered into the contract, or agreed to the variation or renewal, or would only have done so on different terms.
>
> (3) For the purposes of this Schedule, a misrepresentation for which a licensed insurer has a remedy in Division 2 against a consumer may be classified as —
>
> (a) deliberate or reckless;
>
> (b) careless; or
>
> (c) innocent.
>
> (4) A misrepresentation is deliberate or reckless if the consumer knew that —
>
> (a) it was untrue or misleading, or did not care whether or not it was untrue or misleading; and

(b) the matter to which the misrepresentation related was relevant to the licensed insurer, or did not care whether or not it was relevant to the insurer.

(5) A misrepresentation made dishonestly is to be regarded as having being made deliberately or recklessly.

(6) A misrepresentation is careless or innocent, as the case may be, if it is not deliberate or reckless.

(7) It is for the licensed insurer to show that a misrepresentation was deliberate or reckless on a balance of probability.

(8) Unless the contrary is shown, it is to be presumed that the consumer knew that a matter about which the licensed insurer asked a clear and specific question was relevant to the insurer.

...

Division 2

Remedies for misrepresentation

Application of Division

14. This Division sets out the remedies available to a licensed insurer for a misrepresentation by a consumer made in respect of —

(a) a consumer insurance contract of life insurance which has been effected for a period of two years or less; and

(b) a consumer insurance contract of general insurance.

Remedies for deliberate or reckless misrepresentation

15. If a misrepresentation was deliberate or reckless, a licensed insurer may avoid the consumer insurance contract and refuse all claims.

[59] From the above there are three degrees of 'culpability' in respect of misrepresentation by a consumer, namely deliberate or reckless, careless or innocent. In para 7(5), *a misrepresentation made dishonestly is to be regarded as having being made deliberately or recklessly*. I had concluded earlier from the evidence, that the plaintiff was fully aware of the fact that the deceased did not possess a valid licence and which was why he drove the deceased to work in the plantation. *This wilful act of the plaintiff smacks of dishonest misrepresentation!*

[60] Section 26(1) of the RTA provides:

26 (1) Kecuali sebagaimana diperuntukkan selainnya dalam Akta ini, tiada seorang pun boleh memandu sesuatu kenderaan motor daripada apa-apa kelas atau perihalan, di sesuatu jalan melainkan jika dia adalah pemegang sesuatu lesen memandu yang membenarkannya memandu sesuatu kenderaan motor daripada kelas atau perihalan itu, *dan tiada seorang pun boleh mengambil kerja atau membenarkan seseorang lain memandu sesuatu kenderaan motor di jalan melainkan jika orang yang diambil kerja atau dibenarkan memandu itu adalah pemegang sesuatu lesen memandu sedemikian*.

[61] The evidence of SP6, the plaintiff's own witness also confirmed that the plaintiff would send the deceased to work when the fact was that the deceased was employed to work as a lorry driver. In my view, this is the most material of all facts in this case when the plaintiff did not disclose that the deceased only possessed an expired L-licence.

[62] The law has not abolished the duty to disclose on the part of the consumer and that in this case and this court opines that we should not miss the forest for the trees. We must not lose focus of the fact that it was the plaintiff who wanted to take out the policies of insurance from the insurers to cover his employee(s) allegedly as an incentive to the deceased. Was he acting honestly when he purchased the policies? *He had been employing the deceased since 10 May 2017 as a lorry driver despite knowing the deceased did not have a licence, drove him to work in the plantation 3 times weekly and then in October 2017, purchased the policies from defendants 1, 2 and 4 to cover him alone.* Meanwhile, the Takaful policy was purchased in late 2016.

[63] The SCJ further noted the submission of the defendant 2 in the grounds of judgment:

> [149] Berdasarkan jawapan SP7 kepada soalan-soalan semasa pemeriksaan balas yang bermula pada 18 September 2020, SP7 mengaku sebenarnya bahawa selain polisi kemalangan diri yang diambil untuk pekerja, dia juga memperoleh polisi kemalangan diri untuk diri sendiri dan memiliki insurans bagi kenderaan bermotor yang dimiliki iaitu dua buah motorvan Hilux, empat buah lori (muatan 1 dan 3 tan) dan mesin jengkaut meratakan tanah. SP7 juga memiliki lesen memandu kenderaan bermotor yang sah dan lesen menunggang motorsikal. SP7 tidak perlu dijelaskan tentang keperluan mematuhi peruntukan Akta Pengangkutan Jalan 1987 dan dirumuskan sebagai seorang yang celik undang-undang jalanraya serta didedahkan dengan keperluan memiliki perlindungan insurans! Malah, Plaintif adalah seorang peniaga yang sangat cerdik yang celik angka/matematik kerana dalam setiap polisi yang dibeli olehnya sebagai majikan, dia yang memainkan peranan yang penting dalam memperolehi fakta dan angka untuk dimasukkan dalam polisi; pihak Plaintif juga yang membayar premium bagi orang yang diinsuranskan bagi kesemua polisi atas penama yang sama iaitu Raja a/l Krishnan (si mati). Sekiranya terjadi kematian kemalangan menimpa pekerjanya Raja a/l Krishnan, jumlah pampasan yang akan dipungutnya akan mencecah RM1j.
>
> [150] Rumusan dibuat oleh peguam Defendan berkait motif SP7 (yang sepatutnya dipertanggungkan membuat pendedahan maklumat) semasa pemerolehan polisi insurans atas nama Raja a/l Krishnan adalah berdasarkan kedudukan kewangan SP7 yang kurang kukuh dan jumlah pampasan yang bakal diperoleh SP7 sekiranya terjadi kematian kemalangan menimpa Raja a/l Krishnan. Oleh itu, motif pengambilan 4 polisi Kemalangan Diri atas nama Raja a/l Krishnan itu bukanlah untuk perlindungan risiko kecederaan atau kematian kemalangan si mati tetapi ada niat mendapat pampasan yang hampir RM1 juta ... Plaintif telahpun berpengalaman memperoleh pelbagai insurans termasuklah pemerolehan polisi perlindungan insurans kemalangan diri untuk perlindungan Takaful bagi dirinya

sendiri sejak 2016, selain memperoleh insurans perlindungan kenderaan bermotor seperti jentera jengkaut, empat buah lori muatan 1 dan 3 tan, juga kenderaan pacuan 4 roda iaitu 2 buah Hilux!'.

[64] In *Ulaganathan a/l Muthiah*'s case, the learned High Court judge held that:

> Clearly, the deceased knew that his answers to the questions in the proposal form were untrue or misleading. He did not care whether or not they were untrue or misleading and had acted in breach of his duty of *uberrimae fidei*. His answers were relevant to the defendant for its assessment of the risks and whether to accept the risks ... if the defendant had known of the non-disclosed information or deliberate and/or reckless misrepresentation, which clearly increased the defendant's insurance risk, the defendant would either not have entered into the insurance policy or it would have done so on different terms.

[65] The court in that case concluded that pursuant to paras 7(1)(b), 7(2), 7(4), 7(8) and (15) of Schedule 9, the defendant was entitled to avoid the policy and to refuse all claims under the policy by reason of the deceased's breach of his duty of *uberrimae fidei* and to reject the plaintiff's claim. I need not go any further then to conclude that para 15 is applicable in these cases and it enables the insurers to avoid the consumer insurance contract and refuse all claims. If para 5 is to be upheld at all times in favour on the consumers, why does Act 758 also provide for remedies for insurers when misrepresentation is proved?

(vi) Should s 114(g) of the Evidence Act 1950 be invoked against the defendants for failure to call as a witness their authorised agent(s) who filled up the proposal form on behalf of the plaintiff

[66] It was submitted for the plaintiff that s 114(g) of the Evidence Act 1950 should have been invoked by the SCJ against the defendants for their failure to call the three agents as witnesses in the trial. However, I found that as the plaintiff himself had subpoenaed them and then dismissed them without calling them to testify on his behalf, the presumption of adverse inference in s 114(g) cannot be applied in his favour.

[67] In the often-cited case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, the Supreme court held:

> Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[68] The plaintiff contended, inter alia, an adverse inference ought to be drawn against the defendants because it was for the defendants to prove that they have complied with the provisions of Schedule 9. The failure of the agents to explain to him his duty of disclosure and/or the failure of the agent to properly explain the question in the proposal form amounted to a breach of the insurer's duty under Act 758. The defendant 1's counsel submitted (paras 10–10.4 of encl 68), that the plaintiff did not raise this presumption in the trial. In order to invoke the presumption, there must be withholding or suppression of evidence, which the defendants did not commit as the plaintiff had subpoenaed the agents and later dismissed them. Since it was the decision of the plaintiff to not put them in the witness stand, thus the court must not punish the defendants for the plaintiff's decision aforesaid.

[69] I refer to paras 250–251 of the grounds of judgment below:

> [250] Hujah tentang isu yang dibangkitkan mengenai pemakaian s 114 perlu dipertimbangkan dengan merujuk kepada persetujuan peguam plaintif pada 15 January 2020 untuk tidak meneruskan panggilan sepina berkaitan borang cadangan yang diisikan oleh ejen bagi pihak plaintif. Dengan berbuat demikian, plaintif diestop untuk tidak menimbulkan isu pemakaian s 114 terhadap defendan, sebaliknya plaintif sendiri yang terhalang membangkitkan apa-apa isu tentang pemanggilan ejen insurans untuk memberi keterangan di hadapan mahkamah setelah bersetuju mengetepikan hak plaintif untuk mendapatkan keterangan ejen-ejen insurans yang memberi khidmat mereka untuk mengisikan borang cadangan untuk memperoleh polisipolisi insurans bagi pihak plaintif.
>
> [251] Ternyata, borang cadangan yang membentuk kontrak insurans ditandatangan oleh plaintif sendiri. Justeru, tiga saksi yang disepina oleh plaintif itu tidak diperlukan memberi keterangan mengenai apa-apa butiran yang telah dinyatakan dalam borang cadangan kerana kewajipan membuat pendedahan fakta material termasuklah mengenai pemerolehan polisi adalah kewajipan di pihak plaintif, bukanlah ejen plaintif yang menurunkan tandatangannya atas semua borang cadangan dan semua butiran diaku benar oleh plaintif, bukan ejen yang mengisi borang. Ketiga-tiga mereka dilepaskan dan dikecualikan kehadiran memberi keterangan bagi pihak plaintif dalam kes di sini.

[70] The SCJ found that the defendants had discharged their duties under Act 758 since the plaintiff had signed the acknowledgement clause, that the plaintiff admitted the agent Fong Kok Wai did ask him questions in the proposal form and the agent filled it. As such, adverse inference need not be invoked against any of the parties in these circumstances.

[71] To end this issue, I would also briefly allude at this stage to the point raised by the plaintiff that being members of LIAM, it was incumbent upon the insurers to make background checks with each other upon receving the plaintiff's proposal forms through their respective agents. Specifically, I refer to paras 107–108 of the SCJ's grounds of judgment:

[107] Dicabar semasa pemeriksaan balas mengenai butiran dalam borang cadangan yang ditanda tangan oleh plaintif bagi polisi kemalangan diri Ultima V3/Berjaya Sompo Insurance (eksh P32, encl 45, Ikatan D di muka surat 85–87) dengan pengataan bahawa Defendan boleh menyemak status polisi sedia ada dan status lesen memandu yang dimiliki si mati, *SD3 tidak bersetuju bahawa pada masa itu terdapat keperluan atau tanggungan ke atas Defendan untuk membuat apa-apa carian atau semakan status pemerolehan polisi-polisi insurans yang sedia ada milik Plaintif.*

[108] SD3 menekankan bahawa plaintif yang bertanggungan untuk mematuhi 'prinsip *uberimae fidei* atau niat suci hati' dan mendedahkan fakta pemerolehan polisi-polisi insurans yang sedia ada miliknya di bulan Oktober 2018, semasa plaintif memperbaharu polisi-polisi insurans atau semasa plaintif mengisi borang cadangan bagi mendapatkan polisi insurans baru yang melibatkan orang yang dinsurankan yang sama iaitu Raja a/l Krishnan.

LOCUS STANDI

[72] Since I have made my decision that the representation was made dishonestly in 2017, I do not consider it necessary to address at length the issue of locus standi that was discussed by the SCJ upon submission of defendant 2's counsel. She has ruled that the plaintiff did not have locus standi to bring the claim as he was not a nominee of the deceased. If the policies were taken out without dishonest misrepresentation on the part of the plaintiff, I would agree with the defendant 2's submission that the family of the deceased stood as the rightful beneficiaries of the policies and the plaintiff, as the employer, would be the right person to commence the claims on behalf of the deceased's family members. Paragraph 8 of Schedule 10 may be applicable here (refer to paras 22–30 of defendant 2's written submissions).

EX TURPI CAUSA NON ORITUR

[73] Lastly, I will briefly touch on the issue of *ex turpi non causa oritur* that was raised by the defendants in this appeal. Defendant's counsel submitted at para 8–8.5 that the maxim applied since the deceased was riding without a safety helmet and also without a valid license. Counsel submitted that the court should not lend its aid to a man whose cause of action was founded upon an illegal act. The plaintiff submitted that the maxim applied to minor or trivial offences e.g. traffic violations. Counsel for the plaintiff tried to trivialise the issue by stating the violations were punishable with fines and that the present case was on all fours with the recent Court of Appeal case of *Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman* [2022] 4 MLJ 892; [2022] 9 CLJ 307 where the plaintiff did not hold a valid licence to ride a motorcycle which also had not road tax and no policy of insurance against third party risks. The Court of Appeal went on to hold:

While violation of traffic laws must only be dealt with under the specific laws creating the relevant offences, such as in the Road Transport Act 1987 ('the RTA'),

the RTA does not contain any provision which restrict, let alone prohibit, the rights of any road user from making personal injury claims by reason of the claimant breaching the RTA, including in respect of the requirement for holding the requisite licence, road tax and insurance.

[74] In *Tay Lye Seng & Anor v Nazori bin Teh & Anor* [1998] 3 MLJ 873; [1998] 3 CLJ 466 the Court of Appeal held (per Siti Norma Yaakob JCA):

> [1] *While public policy would defeat any claim based on illegality, a balance has to be drawn based on the peculiar facts and circumstances of each case.*
>
> [2] The maxim *ex turpi causa non oritur actio* has limited application in tort. The role of the maxim lies mainly and most exclusively in actions based on contract.
>
> [3] The fact that the first respondent had no valid work permit per se, could not affect his claim for loss of earnings in Singapore. This was because the first respondent was working legally in Singapore initially. He had a valid work permit issued by the Singapore authorities but unfortunately that expired four months before the accident. The obligation to renew the work permit laid squarely with the first respondent's employers and since there was no evidence that the had done so the first respondent had therefore not been culpably responsible for the predicament that he later found himself to be in. In these circumstances, the maxim *ex turpi causa non oritur actio* lacked moral justification and was not applicable in this appeal. (Emphasis added.)

[75] The sessions court judge (SCJ) in her very lengthy grounds of judgment summarised the evidence and findings of SP1 in paras 33–38 on the deceased's liability. It was submitted that here the illegal act was of the deceased not the plaintiff. Moreover, it was SP6 who owed the duty as the owner of the motorcycle to make sure it had a valid insurance cover and road tax at all time of and it the deceased must have a valid licence when riding the motorcycle; the plaintiff cannot be faulted since the breaches of the RTA were by SP6 and the deceased. This argument does not hold water in my view. At the risk of repeating myself, I reiterate the fact that it was the plaintiff in the first instance who had not made a true representation of the deceased's status of not having a valid licence when he purchased the policies. The above case can be distinguished on the facts as here, the claims were founded on illegal act of the plaintiff in making a dishonest representation to the insurers.

[76] I have considered the submissions and case laws cited by the plaintiff but I am unable to agree with his position. He has misconstrued the law in regard to the duty to take care to disclose material facts to the insurers. The facts of the case showed that the plaintiff's claims were untenable wherein the insurers can repudiate the contract in accordance with para 15 of Schedule 9.

CONCLUSION

[77] The plaintiff had failed to prove his claims on a balance of probabilities and therefore, the SCJ dismissed the claims. It was unnecessary for me to disturb the decisions of the SCJ. Premised on the above considerations, I dismissed the four appeals with costs.

Appeals dismissed with costs.

Appeal dismissed and trial court's decision affirmed.

Reported by Ashok Kumar